

**STATE OF MICHIGAN
IN THE SUPREME COURT**

**On appeal from the Court of Appeals,
Jane Markey, P.J., Deborah Servitto and Amy Ronayne Krause, JJ.**

**ESTATE OF BARBARA JOHNSON, deceased,
By JODEANNA HOWARD., Successor Personal Representative,**

Plaintiff-Appellee

Supreme Court No 145773

Court of Appeals No. 297066

-v-

Wexford Circuit Court No. 07-020602-NH

ROBERT F. KOWALSKI, M.D.,

Defendant-Appellant

**and
TRINITY HEALTH-MICHIGAN, dba
MERCY HOSPITAL CADILLAC,
a Michigan corporation,
Jointly and severally,**

Defendant

PLAINTIFF-APPELLEE'S

BRIEF ON APPEAL

*** * * ORAL ARGUMENT REQUESTED * * ***

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STATEMENT OF QUESTION PRESENTED

Issue: Did the trial court err and deny plaintiff a fair trial in ruling Dr. Urse's affidavit and related preliminary contextual correspondence inadmissible, preventing them from being displayed to the jury¹, barring rebuttal evidence of same including testimony of Dr. Urse's insurance representative, and restricting plaintiff's counsel in opening statement on these subjects, where the critical issue at trial was the credibility of the testimony of Drs. Urse and Kowalski as to the presence of Dr. Urse in the emergency room at 3:05 p.m. when the patient went into fatal respiratory and cardiac distress, and where the medical records, answers to interrogatories referencing those records, and other documentary materials suggested that there was no doctor present until after the patient's condition calamitously deteriorated?

Plaintiff-Appellee answers "yes" and "yes".
The Court of Appeals answered "yes" and "yes".

A. Are the Urse affidavit, the contextual letters which engendered it, and the testimony of the insurance representative all properly admissible as relevant evidence, MRE 402, at least for impeachment purposes?

Plaintiff-Appellee answers "yes".
The Court of Appeals answered "yes".

B. Did the trial court's exclusion of the Urse affidavit and contextually surrounding documents and testimony, preventing such evidence from being seen or considered by the jury, deny plaintiff a fair trial and constitute an abuse of discretion?

Plaintiff-Appellee answers "yes".
The Court of Appeals answered "yes".

C. Are Dr. Kowalski's contentions erroneous, misleading, and such as fail to warrant reversing the Court of Appeals' direction for new trial?

Plaintiff-Appellee answers "yes".

1. Does Dr. Kowalski misrepresent the "governing law" (Kowalski's brief, pp. 19-25)?

Plaintiff-Appellee answers "yes".
The Court of Appeals answered "yes".

¹ As framed, this issue subsumes the two questions posited by this Court in its order granting leave to appeal (Apx 37a): "(1) Whether the affidavit of [footnote 9 continues on next page] [footnote 9 continued from previous page] Charles Urse, M.D., is admissible; and (2) whether correspondence between the plaintiff's counsel and Dr. Urse's claims representative is admissible."

2. Was the Urse affidavit not hearsay (Kowalski's brief, pp. 26-29)?

Plaintiff-Appellee answers "yes".

The Court of Appeals answered "yes".

3. Does Dr. Kowalski's Issue II erroneously conflate admission with admissibility?

Plaintiff-Appellee answers "yes".

The Court of Appeals answered "yes".

4. Is Dr. Kowalski's analysis (his brief, pp. 31-37) of MRE 104(b), 602 and 401 incorrect?

Plaintiff-Appellee answers "yes".

The Court of Appeals answered "yes".

5. Is Dr. Kowalski's claim of harmless error hopelessly incorrect?

Plaintiff-Appellee answers "yes".

The Court of Appeals answered "yes".

6. Is Dr. Kowalski's "public policy" argument (brief, pp. 43-49) entirely fatuous?

Plaintiff-Appellee answers "yes".

The Court of Appeals answered "yes" (by ignoring it entirely).

7. Did the trial court also err in barring Ms. Croze as a rebuttal witness?

Plaintiff-Appellee answers "yes".

The Court of Appeals did not directly address this question.

COUNTERSTATEMENT OF FACTS

Introduction

This Court has granted leave to appeal (order of October 2, 2013, Apx 37a) in a case presenting entirely mundane evidentiary and fair trial issues, and concomitantly ordered briefing of two specific issues¹ which, as shown below, have been long settled both by prior decisions of this Court neither cited in Dr. Kowalski's application for leave or his brief on appeal, as well as straightforwardly confirmed by the Michigan Rules of Evidence (consistent with prior case law). At the end of the day, this Court should conclude that leave was improvidently granted and that its scarce judicial resources could be better devoted to issues of real jurisprudential significance; alternatively, the decision of the Court of Appeals, 296 Mich App 664 (Apx 24a-35a), which correctly determined that plaintiff was denied a fair trial, should be affirmed.

This medical malpractice wrongful death case stems from the untimely and entirely preventable demise of 64 year old Barbara Johnson. Mrs. Johnson essentially bled to death at Cadillac Mercy Hospital following a horse bite to the face and neck, despite the fact she reached the hospital in a conscious and still salvageable condition. After a twenty-seven minute period of relative stability in the Emergency Room, she suddenly began drowning in her own blood and, unable to breathe, suffered cardiac arrest (1119a). Mrs. Johnson sustained brain damage due to the resulting lack of oxygen; she remained in a vegetative state, on life support, for five days before death became official (1b).

Plaintiff's theory of the case was that there was no physician in attendance when Mrs. Johnson's condition suddenly deteriorated, thus delaying intubation or other well established life-saving measures. The Emergency Room physician who initially evaluated her, defendant-

¹ "(1) [W]hether the affidavit of Charles J. Urse, M.D. is admissible; and (2) whether correspondence between plaintiff's counsel and Dr. Urse's claims representative is admissible."

appellant Kowalski, had been called away. According to the medical records, consultants capable of intubation had not yet arrived on the scene. The initial lawsuit was accordingly brought against the Emergency Room physician, Dr. Robert Kowalski, and Cadillac Mercy Hospital; the latter settled before trial (12a, Docket Entries ##159 and 171).

During trial, crucial evidence demonstrating that no physician was in the room when Mrs. Johnson deteriorated was not permitted in evidence by the trial judge. Incriminating documents, and an affidavit by a key witness, were kept from the jury's purview. The defense was essentially allowed to use unchallenged evidence and testimony which was substantially contradicted by the excluded documents.

Prior to the complaint being filed, following the submission of Plaintiff's statutory Notice of Intent under MCL 600.2912b (28b-45b), there was extensive communication among counsel, which included communications with the consulting anesthesiologist's (Dr. Charles Urse's) liability insurance carrier, American Physicians Assurance Company (APAC) (48a-49a, 50a). The same carrier provided coverage for both physicians (96a).

At that time, Dr. Urse and his insurance representative, Nancy Croze, confirmed the reliability of the medical records—which were at least partially created by Dr. Kowalski (110a)—and provided written assurances that Dr. Urse was not present in Mrs. Johnson's room until after she became *in extremis* (50a, 51a). Based on these representations, Plaintiff's counsel did not name Dr. Urse as a party-defendant in the lawsuit. A signed affidavit purporting to confirm Dr. Urse's lack of involvement, signed by Dr. Urse and notarized (51a), was supplied by his insurance representative (97a), and thus litigation commenced against only one physician, Dr. Kowalski (51a, 48a-49a, 14b-27b).

Once the proceedings reached the deposition stage, the nurse in attendance upon decedent

throughout the fatal episode confirmed that, when decedent called for help and indicated she could not breathe, the nurse called for assistance, and only then did Dr. Kowalski, who had left the room, return and Dr. Urse appeared (98a). However, Dr. Urse subsequently changed his story (*id.*). Dr. Urse's new version contradicted the medical records (including a portion of the records prepared by himself indicating the patient was already in respiratory distress when he entered the room), and conflicted (at least arguably, if not actually) with his earlier affidavit (338a-339a, 51a). The defense, with the help of Dr. Urse, presented an apparently plausible, but undocumented (actually, anti-documented²) tale, lacking in factual support and utterly at odds with the medical charts recorded contemporaneously with the events in question.

At trial, Dr. Urse and Dr. Kowalski both testified they were at Barbara Johnson's bedside before she deteriorated and before Dr. Kowalski was called away. Dr. Urse further stated he remained in the room. (677a) The medical record clearly supported Plaintiff's assertions that Mrs. Johnson was initially stable, Dr. Kowalski left her bedside, and only after she developed life-threatening respiratory distress did Dr. Urse arrive, too late to prevent cardiac arrest and fatal brain damage—Dr. Urse admitted there is nothing in any medical record to document his arrival before Mrs. Johnson's fatal respiratory collapse (675a-676a).

Dr. Kowalski's own dictated summary in the chart indicates clearly that Mrs. Johnson developed "difficulty breathing" and only then "ENT specialist and anesthesia were called STAT." (9b). Dr. Urse's handwritten note similarly begins, not with a description of stability, but with a patient who was already "in respiratory distress" and could not breathe upon his

² As reflected in Plaintiff's Trial Exhibit 7 (3b-7b), someone made a clumsy attempt to create a fake record. The first page of that exhibit (3b), a Mercy Hospital Emergency Department Record, purports to show that at 3:06 p.m. (the last two numbers in "1506" have been written over other numbers) "Dr. Kowalski in Rm. Dr. Urse in Room—cont oral suctioning to maintain airway." JW. But p. 3 of the same exhibit (5b) is the identical record, with no entry for 3:06 p.m. Dr. Kowalski later admitted he was not in the room when decedent's fatal episode began.

arrival (10b). It was the flight surgeon from Aero-Med, who arrived at 3:36 p.m., at least half an hour after decedent went into respiratory and then cardiac arrest (12b), who eventually succeeded in establishing an airway (674a). By that time, brain damage from anoxia had already sealed decedent's fate.

Efforts to impeach the Defendant's position, by presenting the written affidavit of Dr. Urse and his insurance representative's letter (and the prior letter from plaintiff's counsel to the insurance representative), were thwarted by the trial court. Plaintiff was also denied access to the insurer's files (137a-138a, 140a).

Both in pretrial motion and with the proffer of exhibits at trial, the trial judge permitted the defense freely to present testimony supporting its theory without Plaintiff being able to introduce the most probative impeachment evidence or to reveal its proper context. Exhibits, including a letter from APAC (50a), and the affidavit from Dr. Urse (51a), both crucial to Plaintiff's case, were not permitted into evidence. As a result, a miscarriage of justice occurred. Efforts to impeach the defense's new position, predicated on presentation of Dr. Urse's written affidavit and his insurance representative's letter, were barred by the trial court. As a result, in evaluating the credibility of witnesses and weighing the evidence, the jury was unaware that the defense position represented a complete reversal of prior sworn statements, and a gross miscarriage of justice occurred when a verdict of no cause for action was returned.

COUNTERSTATEMENT OF FACTS

The Necessity of a Complete Counterstatement

Defendant's brief on appeal features a one-side summary which refers to NONE of the key evidence on which plaintiff's case hinged and, as a statistical measure of bias, omits at least 20 of plaintiff's 25 trial exhibits. Moreover, Defendant has opted to summarize only the facts as

he posits them, ignoring everything which detracts from his version of events, interspersing his summary with argument³ ranging from snippets to extended screeds. No mention whatsoever is made of plaintiff's experts, who faulted Dr. Kowalski for unconscionable delay in intubating plaintiff's decedent, Barbara Johnson, which set the stage for the grisly and avoidable death (drowning in her own blood while conscious) that befell her—for example, Dr. Alfred Frankel, M.D., a board-certified ER specialist, who testified at trial:

When Mrs. Johnson presented to the emergency room, it was obvious she was going to have trouble breathing down the line in her course in the emergency department. It was obvious that she needed to be intubated. And the emergency doctor, Dr. Kowalski, never made the attempt to intubate her.

And that's my only criticism, that she deserved the opportunity to be intubated in a timely fashion. There were some 15 minutes⁴. (Apx 38a).

Instead, Dr. Kowalski's brief prattles on about how intubation required a cricothyrotomy, which he claims is a "complex procedure", but that more difficult form of intubation was necessitated only because Dr. Kowalski shillyshallied and dithered until the patient went from having a clear airway (which Dr. Kowalski admits, citing 887a-890a, 898a, 677a-678a) for the first 27 minutes after arrival in the ER to being in respiratory distress (681a-682a). By the time the cricothyrotomy was completed some 40 minutes later, the patient had suffered cardiac arrest and brain death (1118a-1119a).

³ E.g., Appellant's Brief, p. 4, end of 2nd full paragraph, defendant excuses Dr. Urse's failure to note his time of arrival in the ER "because he considered them clinically insignificant". To like effect, see Appellant's Brief, p. 17 "The Court of Appeals opinion reversing, on the basis of impeachment evidence, a no-cause verdict after a six-day trial can only be characterized as result-oriented."

Indeed, that entire paragraph of Appellant's Brief is nothing but argument—and yet no authority supports counsel's bloviations. The Court of Appeals concluded, after painstaking review, that the trial judge repeatedly erred in excluding relevant and admissible materials, and that in the end plaintiff was denied a fair trial. It should hardly matter whether an unfair trial took 6 days or 6 minutes. Once error "appears to the court inconsistent with substantial justice", MCR 2.613(A), it can no longer be whitewashed as "harmless".

⁴ Actually, there were 27+ minutes—decedent arrived at Mercy Hospital at 2:38 p.m. (38a) and respiratory distress did not commence until 3:05 p.m. or later (5b).

The reliance on such a one-side presentation not only signals that defendant fears the result if this Court were to understand the issues of fact presented to the jury, which might work to his detriment when this Court tumbles to the realization that the trial court evidentiary exclusions which are the focus of this appeal left the jury with a skewed view of critical disputes, forcing the jury to return a verdict based on hearing all the evidence for the defense and only a fraction of the plaintiff's proofs. Moreover, this Court's rules flatly prohibit the use of biased and argumentative factual summaries by appellants; appellants instead have a duty to formulate a

statement of facts that must be a clear, concise and chronological narrative. All material facts, both favorable and unfavorable, must be fairly stated without argument or bias.

MCR 7.212(C)(6), incorporated by reference into MCR 7.306(A). Failure to comply with this requirement should be grounds to dismiss this appeal, or to impose sanctions on appellant or his counsel. *Cvengros v Farm Bureau Ins Co*, 216 Mich App 261, 269; 548 NW2d 698 (1996).

As defendant Kowalski has thus chosen, from the outset, to engage in a tendentious, mendacious, and prevaricated presentation of the facts, contrary to the governing rules, his victim's personal representative (plaintiff-appellee) has no choice but to present a complete counterstatement of facts which fairly presents the issues for review.

Concise Counterstatement of Material Proceedings and Facts

The initial injury occurred at Mrs. Johnson's residence on April 4, 2005 (38a). Mrs. Johnson, a horse owner, was severely bitten by one of her mares after she assisted it in giving birth to a colt (*Id*). She was bleeding profusely from a two inch wide gash which extended four inches below her right eye, as well as a six to eight inch laceration located near her jaw line (*Id*). Mrs. Johnson herself called EMS and remained lucid enough to call her daughter as well (326a).

According to the EMS run sheet, the ambulance arrived at the scene at 14:01(2:01 p.m.) and left Mrs. Johnson's home at 14:21 (38a). She was rushed to Cadillac Mercy Hospital and

arrived around 14:38 (*Id*). Dr. Kowlaski's dictation indicated that Mrs. Johnson was "alert" upon his physical examination of her (39a). At 14:52, based on the severity of her injuries, Dr. Kowalski requested an Aero-med air flight to transfer Mrs. Johnson to the trauma department at Spectrum Hospital in Grand Rapids (792a, 11b).

In the meantime, during transport to the Cadillac hospital, EMS technicians noted Mrs. Johnson's bleeding was becoming increasingly difficult to control, and it was necessary to suction blood from her mouth (38a). En route, EMS personnel contacted the Emergency Room at Mercy Hospital and spoke directly with Dr. Kowalski regarding Mrs. Johnson's condition (*Id*). Within 7 minutes of arriving at the hospital by ambulance, by 14:45, Mrs. Johnson was triaged as a priority one, and Emergency Department Records show that she required oral suctioning to breathe due to the amount of blood in the throat area (5b).

Dr. Kowalski determined that Mrs. Johnson required intubation to protect her airway and he wanted backup to assist in the intubation (333a). Intubation accessories are kept immediately outside Room 11 of the ER Department, where decedent was being treated (459a).

Charting was done by ER Nurse Joel Wiebenga, a task for which he has been thoroughly trained (460a-461a). He was trained that, if an addition or correction to the chart were later determined necessary, he was to identify the time of the emendation, write the words "late note", and only then record the change (461a—but see footnote 2 above). Nurse Wiebenga did make such a late entry at 1630 hours as to the number of units of blood administered to decedent (462a). With that one exception, times were ostensibly charted in decedent's medical notes as closely as possible to when the event actually occurred (463a), and the hospital record is the best evidence of when events between 3:00 and 3:05 p.m. took place (463a-464a). While charting is important, Wiebenga emphasized that his first priority was taking care of his patient (463a).

According to the hospital record, Dr. Kowalski, the patient, and Nurse Wiebenga were together in Room 11 at 2:45 p.m., at which time Wiebenga triaged the patient as priority one, reflecting maximum urgency (464a-465a, 466a). At that time, decedent was alert and oriented as to time, place, and situation (466a). Decedent needed oral suction in order to breathe due to the bleeding from her mouth and face and formation of saliva (467a, 468a). With ongoing suctioning, decedent had elevated blood pressure but normal pulse, respiration, and oxygen saturation (467a-468a). Because it was easier for the patient to evaluate her own need for suctioning rather than attempt to communicate it to those attending her, Nurse Wiebenga allowed Mrs. Johnson to suction herself as she felt the need (468a-469a).

After about fifteen minutes, Dr. Kowalski was called away from Room 11 (470a). At 3:05 p.m. Wiebenga noticed blood seeping under Mrs. Johnson's bandages, which had not been there previously (473a). The patient then pleaded she could not breathe and needed help (*id.*).

During his trial testimony, Nurse Wiebenga claimed he could not remember if there were anyone else in Room 11 with himself and the patient at this critical juncture (473a). He was then shown a transcript of his December 2, 2008 video deposition, pp. 54-55, where he testified that Dr. Urse was not yet present and that Dr. Kowalski was absent, and he was the only one in the room other than Mrs. Johnson (475a-477a, 481a).

At this point, Wiebenga called for assistance (479a). Up to this point, the patient was sitting upright (a position in which intubation is not possible, *id.*, 490a), had not been intubated, and had not been prepped for intubation by administration of a sedative or paralytic agent (480a). While at trial Wiebenga testified that, after he summoned help, he recalls seeing Dr. Urse in the room, he was not certain Dr. Urse came in response to his request for assistance, although at deposition he had seemingly acknowledged that moments after he stuck his head out of Room 11

to yell for help, medical staff began arriving to assist (483a-484a). At that point, the crash cart was opened and intubation was attempted. (484a-485a).

Becoming a progressively more hostile witness, Wiebenga asserted that the record as to Mrs. Johnson does not reflect that Dr. Kowalski left the room at approximately 3:00 p.m. (id., p. 318—Apx 489a). However, the record of another patient who suffered a cardiac arrest shows that Dr. Kowalski attended that patient at 3:00 p.m. (id.). Wiebenga did admit that Dr. Kowalski was not present when Mrs. Johnson went into respiratory distress at 3:05 p.m. (502a). Nothing in the records indicates Dr. Urse was present before 3:05 p.m. (496a). Dr. Urse himself prepared a note indicating the patient went into respiratory distress at 4:10 p.m. (id.), a clear mistake.

The hospital notes next reflect that at 3:15-3:16 p.m. both Drs. Kowalski and Urse were in Room 11, and one of them attempted intubation (491a). The record—now in another person's handwriting—shows that decedent's blood pressure had dropped to 99/78, oxygen saturation fell below 95%, and a cricothyrotomy was performed (492a-493a). Shortly thereafter oxygen saturation fell into the low 90s, then upper 80s (500a).

After returning to Room 11, Dr. Kowalski called STAT for the assistance of anesthesiologist Dr. Urse, as well as ENT specialist Dr. Lisa Jacobson (503a). That Drs. Urse and Jacobson were both called and arrived after decedent's condition worsened appears confirmed by the medical record created by Dr. Kowalski himself (9b⁵), which reflects:

While in the emergency room, the patient started to bleed more profusely from her wrap and she developed some difficulty breathing. ENT specialist and anesthesia were called STAT. They did arrive.

That note was prepared and signed by Dr. Kowalski.

As Drs. Jacobson and Urse attempted a cricothyrotomy, cardiac arrest occurred at 3:40

⁵ Further evidencing the bias permeating Dr. Kowalski's compilation of his Appendix, he included p. 1 of this document (38a, 8b), but carefully—and inexcusably—excluded p. 2 (9b).

p.m. and lack of a pulse was documented at 3:43 p.m. (504a-505a). CPR was initiated at 3:40 p.m. (505a). Epinephrine was administered and CPR continued through 3:45 p.m. (506a-507a), but there was still no blood pressure or pulse at 3:50 p.m. (508a). At 4:00 p.m. a pulse and blood pressure were detected (508a).

Dr. Kowalski testified that, as an ER physician, he is an expert in airway management (781a). Airway management is the single most important skill of the emergency physician (782a). Dr. Kowalski anticipated that Barbara Johnson was a patient whose condition could deteriorate and swelling might restrict her airway at any time (791a-792a). That was why he wanted Mrs. Johnson transported to Grand Rapids, which has a level one trauma center, unlike the hospital in Cadillac (792a). But to evacuate a patient by helicopter, an airway must be first established (792a, 797a). Thus, within the first 5 minutes of attending Mrs. Johnson, Dr. Kowalski determined she would have to be intubated (793a). Mrs. Johnson was categorized as a patient at risk of airway obstruction, which can occur suddenly, distorting the anatomy, rendering intubation more difficult or even impossible, which is exactly what happened in this case (794a). In fact, Dr. Kowalski anticipated that Mrs. Johnson “was going to be a difficult airway” (798a).

At the time decedent was in the Cadillac ER, Dr. Kowalski was the only ER physician present, although there were 15 ER patients at the same time (803a-804a). Kowalski admitted that he had to leave Mrs. Johnson to deal with another patient in Room 9 in cardiac arrest at 3:00 or 3:01 p.m. (813a-814a). Dr. Kowalski had resuscitated the other patient by 3:06 p.m. and wrote a prescription for Phenergan because that patient vomited (815a).

On being served with plaintiff’s notice of intent under MCL 600.2912b, Dr. Kowalski responded with an affidavit of meritorious defense, in which he did not take exception in any respect to the time line reflected in the hospital records (806a-808a). Nothing in the records

indicates Dr. Urse was present before 3:05 p.m. (808a). Yet in response to interrogatories as to what he had done and when, Dr. Kowalski had answered under oath, MCR 2.309(B)(1), "see medical records" (810a-811a). Similarly, another interrogatory asked Dr. Kowalski to identify any other medical practitioner who assisted him in treating Mrs. Johnson, and to specify the time such assistance was rendered. Again, Kowalski answered under oath "see medical records" (811a). Kowalski could not remember if he was in Room 11 when Mrs. Johnson stopped breathing at 3:05 p.m. (816a), but clearly he was then attending another patient in Room 9 (11b).

Plaintiff's theory of the case was that the failure to immediately intubate Mrs. Johnson during the 22-27 minutes Dr. Kowalski initially spent with her, and the window of time she was left unattended by physicians during Dr. Kowalski's absence, allowed her already serious condition to deteriorate fatally due to lack of intubation⁶. After Mrs. Johnson went into respiratory distress as blood hemorrhaged into her throat (9b, 10b, 38a), Dr. Urse entered the room for the first time and attempted to intubate Mrs. Johnson, but too much blood had accumulated in the throat area (487a; 38a). Records indicate that at 15:15, Dr. Kowalski and Dr. Urse were both present in Mrs. Johnson's room and tried to maintain her airway (4b), but she went into cardiac arrest and suffered loss of oxygen to the brain (1b, 9b), causing death.

Records from the AeroMed flight crew indicate that when they arrived at Mercy Hospital at 15:36 (3:36 p.m.) to take Mrs. Johnson to the Spectrum Trauma Center, resuscitation attempts

⁶ Contrary to appellant's revisionist version of the trial (appellant's brief, p. 2, ¶2, lines 1-3), the presence of Dr. Urse at the critical moment when Barbara Johnson began drowning in her own blood and, being conscious, uttered her final words expressing fear and horror as her impending fate stole upon her, was the central issue at trial. That meant that whether Drs. Kowalski and Urse had conspired to change their stories to avoid malpractice liability was the principal question for the jury to resolve; this was clear to both parties and the trial judge even before the actual trial began, when the trial court heard plaintiff's motion in limine regarding impeaching Dr. Urse's post-affidavit recounting of events and Dr. Kowalski's post-interrogatory attempt to contradict the time line delineated in the medical records (95a-141a) he adopted under oath.

were in progress (11b). CPR was being administered at 15:40 (6b). The flight surgeon was able to establish the airway (11b), but much too late for Mrs. Johnson's already oxygen-starved brain.

Mrs. Johnson was technically alive, but brain dead and in a vegetative state, for the next five days at Spectrum Hospital (1b). Her official date of death was April 9, 2005, when her family made the decision to remove life support (1b).

Dr. Urse's own handwritten records, his affidavit, and other eye witness testimony indicate that he was not present during the critical time periods leading up to Mrs. Johnson's fatal episode, nor was he present in the minutes prior to her cardiac arrest while Dr. Kowalski was attending her (38a, 51a, 476a-477a). Rather, Dr. Urse entered the room after Mrs. Johnson said she could not breathe and went into respiratory distress, when Nurse Weibenga called out for help (488a). In his handwritten Progress Note dated 4/4/2005 (10b), Dr. Urse claimed "Pt in respiratory distress—said she couldn't breathe * * *" at 4:10 p.m., which is clearly inaccurate—by that time, Mrs. Johnson was already brain dead. According to Dr. Urse's own records, Mrs. Johnson was in "definite distress" and "needed airway" when he first examined her (38a).

Dr. Urse's August 9, 2007 affidavit states in ¶4 (51a [not admitted]):

* * * I was contacted by beeper or through the OR front desk staff * * * in regards to a STAT ER page on patient Barbara Johnson on the afternoon of April 4, 2005. Then I immediately proceeded to PACU to obtain the anesthesia department airway box, and then immediately proceeded to the Emergency Room, arriving within approximately two to three minutes after I was notified.

Granting that this might be ambiguous in some respects (although, unless decedent were already in respiratory distress, there would be no identifiable reason for Dr. Urse to go first to "PACU to obtain the anesthesia department airway box") as to the *exact* timing, the affidavit was prepared at the request of Nancy Croze, Senior Claims Representative of APAC, Dr. Urse's

malpractice insurer. After an initial phone conversation between Cyril Weiner (plaintiff's lead counsel) and Ms. Croze, Weiner wrote her as follows on July 16, 2007 (48a-49a [not admitted]):

* * * Based on the information provided * * * Thereafter, Barbara began to hemorrhage and it was only at that point that Dr. Urse and Dr. Jacobson were called in to assist.

* * *

At this point, I am planning on filing a case only against the emergency room physician, assuming the above information is accurate. I would need some kind of verification perhaps in a form of an affidavit by Dr. Urse that the above information is in fact correct. Dr. Urse could simply state that he was not called until after 3:05 p.m.

Ms. Croze then obtained Dr. Urse's affidavit, and forwarded it to Mr. Weiner with a cover letter dated August 15, 2007 (50a [not admitted]), in which she wrote:

In follow up to our recent discussions and your July 26, 2007 correspondence, I am enclosing an Affidavit of Charles J. Urse, DO.

I am confident that this document will meet your needs as you assess your intentions for pursuit of the case.

The two letters resolve ambiguities in Dr. Urse's affidavit by providing important context. Weiner's letter (48a-49a) clearly stated his understanding that Dr. Urse was summoned only after Mrs. Johnson went into respiratory distress; he requested an affidavit to confirm that assessment. Dr. Urse then supplied an affidavit (51a) which not only strongly implies Mrs. Johnson must have already been in respiratory distress when he was summoned (explaining why he first went to obtain the anesthesia department's airway box), but also responds to Mr. Weiner's request (as communicated by Ms. Croze), which suggested that Dr. Urse should not bother responding if he had in fact been summoned earlier. Finally, Ms. Croze "confidently" represented that Dr. Urse's affidavit "will meet your needs" (50a) as Mr. Weiner had explained them in his July 26, 2007 letter. Note that, as defendant concedes, plaintiff duly subpoenaed Ms. Croze to testify at trial (Appellant's Brief, p. 8, citing 87a-88a), and also listed Dr. Urse's affidavit, Mr. Weiner's letter to Ms. Croze, and her cover letter to Mr. Weiner enclosing the Urse

affidavit, in his compilation of trial exhibits (48b, Items ##32-34; 11a, Docket Entry #155).

In his deposition and courtroom testimony, however, Dr. Urse recounted a completely different sequence of events which entirely contradicted his own notes and sworn affidavit. Dr. Urse testified that Mrs. Johnson was stable when he came into the room (669a). He said he was present with Dr. Kowalski and they discussed the best method to manage Mrs. Johnson's airway, through either intubation or a cricothyrotomy (655a-657a, 660a-661a). After several minutes together, Dr. Kowalski was called away STAT to attend another cardiac arrest at about 3:01 p.m. and remained until at least 3:06 p.m. (11b). **But** according to the Kowalski-Urse reordering of the chronology, it was only after Dr. Kowalski left Mrs. Johnson's room and Dr. Urse remained that Mrs. Johnson began to experience difficulty breathing and prompted Dr. Urse to attempt emergency intubation (665a). However, Urse was unable to do so because the large amount of blood in decedent's airway obscured the necessary landmarks (823a). Indeed, Dr. Kowalski's own expert, Dr. Walls, testified he had written in his book that the watchword for the situation should have been "acute progressive anatomical airway distortion is a potential time bomb. Intubate early before deterioration occurs." (1176a).

Dr. Urse's testimonial account, in both deposition and at trial, of his involvement with Mrs. Johnson does not correlate with the eyewitness testimony from Nurse Joel Weibenga (or with the medical records). At 15:05, when Dr. Kowalski was out of the room and Mrs. Johnson began to bleed more profusely through her facial bandages, Nurse Weibenga testified he was then alone with Mrs. Johnson, and that Dr. Urse was not present in the room (475a-477a). It was only after Mrs. Johnson's condition changed and bleeding worsened that Nurse Weibenga yelled out for help and Dr. Urse entered the room shortly thereafter (487a). Nurse Weibenga has no recollection of Dr. Urse being in Mrs. Johnson's room prior to 15:05, nor does he recall

any intubation attempts prior to that time (475a-476a, 480a).

Instead of permitting a wide ranging challenge to the testimony of Drs. Urse and Kowalski as to the sequence of events and their presence or absence from the room when decedent's condition deteriorated, the trial court truncated Plaintiff's attack. The letters from the insurance representative and Plaintiff's counsel, which provide key background and context for Dr. Urse's affidavit (317a), although appropriately listed and marked without objection as exhibits before trial, were disallowed in evidence. Plaintiff's exhibit list, timely filed with the trial court two weeks before trial (48b, Items ##32-34; 11a) in accordance with the trial court's March 18, 2008 scheduling order (and after the motion in limine hearing of January 25, 2010), clearly listed and described "Cyril Weiner letter dated 7/26/07" and "Nancy Croze letter date[d] 8/15/07." These letters were referred to on multiple occasions, *outside* the presence of the jury, during trial proceedings. An offer of proof was later made (1201a) in regard to the letters and the Urse affidavit (51a), but the the trial court refused to lift its exclusion of all such evidence.

Immediately after the jury was selected, counsel for Plaintiff asked the trial court's permission to refer to and show the jury the letters and the affidavit during opening statement. (310a). The court disallowed any reference to the crucial letters, on grounds that Dr. Urse's affidavit did not mention them expressly. (321a-322a). The letters were important to explain why the affidavit was prepared pre-suit by a key witness and what it was intending to clarify--- Dr. Urse's affidavit did not emerge *ex nihilo*, but as the product of the epistolary exchange between Mr. Weiner and Ms. Croze, with Ms. Croze also acting as intermediary in obtaining Dr. Urse's affidavit for the very purpose of confirming that Dr. Urse had not arrived in the emergency room until after decedent's fatal bleeding incident had commenced.

Moreover, Dr. Urse's affidavit likewise was not permitted even to be mentioned "in any

fashion” during opening statement because it was asserted to be technically hearsay. (322a)⁷. This ruling impaired plaintiff’s entire presentation due to inability to introduce or refer to crucial impeachment evidence either at all, or until after opening statements had already framed a case in which such materials never could be fully brought within the trier of fact’s scrutiny.

None of this information came as a surprise to the trial court or defense counsel. Two weeks before trial a Motion in Limine on this subject was argued. (89a-152a). In this Motion, Plaintiff’s counsel argued that the defense’s position, if presented as anticipated, would permit a fraud on the court and jury (107a). At that time, the trial court expressed its expectation that all these impeachment materials could be freely developed for the benefit of the jury (139a). Plaintiff’s trial counsel duly planned their entire trial strategy around that ruling.

But then, just as trial began on February 9, 2010—and after counsel for the parties had agreed on January 25, 2010 that there would be no last-minute motions on the first day of trial (160a)—the trial court pulled the rug out from under plaintiff’s entire prepared presentation. The affidavit of Dr. Urse was not allowed in evidence (623a), and not shown to the jury (603a, 606a-607a; 1212a) on grounds it could only be used for impeachment and not admitted into evidence, which directly contradicted MRE 105. The letters which provided indispensable context for Dr. Urse’s affidavit were disallowed. Plaintiff was precluded from calling Ms. Croze, the insurance representative, as a witness (1201a), and Mr. Weiner was barred from providing rebuttal testimony as to his correspondence with Ms. Croze, on grounds the trial court believed Dr. Urse, merely by denying he had seen either letter (612a), had rendered the letters immaterial (1204a). In the end, after accusing Dr. Kowalski of fabricating his version of events in opening statement, Plaintiff was prevented from adducing for the benefit of the jury the documentary evidence

⁷ Plaintiff was permitted in opening statement to inform the jury that Dr. Urse “signed something * * * contrary to his [expected] testimony.” (323a).

supporting plaintiff's position or even basing an interpretation of events on the excluded evidence (yet with the defense unfettered in its ability to argue for its contrary interpretation). The trial court usurped the jury's ability to weigh all the evidence (1206a-1207a, 1210a), and opined that MRE 613(b) barred admission of Dr. Urse's affidavit and limited plaintiff to merely cross-examining Dr. Urse thereon (1211a).

For her part, Dr. Jacobson testified she was in her private office 10 minutes away from the hospital when she received a call to go to the ER (551a-552a). After finishing with her patient, she drove to the hospital (553a-554a). Other doctors were already working on decedent and Dr. Jacobson took a secondary role (556a, 566a). She did not know what time she was called or what time she arrived (554a, 556a), and no sense of time passing either (570a).

The jury returned a verdict of no cause for action on February 18, 2010 (1319a). Judgment in accordance therewith was then entered on March 2, 2010 (22a-23a), following which plaintiff timely claimed an appeal of right. The Court of Appeals reversed and ordered a new trial, *Howard v Kowalski*, 296 Mich App 664; 823 NW2d 302 (24a-35a), and denied reconsideration⁸ (36a). Dr. Kowalski then sought leave to appeal, which was granted (37a)

ARGUMENT

Issue: The trial court erred and denied plaintiff a fair trial in ruling Dr. Urse's affidavit and related preliminary contextual correspondence inadmissible and preventing them from being displayed to the jury⁹, barring rebuttal evidence of same including testimony of Dr. Urse's insurance representative, and restricting plaintiff's counsel in opening statement on these subjects, where the critical issue at trial was the credibility of the testimony of Drs.

⁸ Reconsideration was sought mainly on grounds the Court of Appeals failed to address the issues raised by Dr. Kowalski on cross-appeal (the issues were not preserved, were unsupported by authority, and were based on facts contrary to the record). Those issues were abandoned when Dr. Kowalski sought leave to appeal in this Court (57b-59b).

⁹ As framed, this issue subsumes the two questions posited by this Court in its order granting leave to appeal (Apx 37a): "(1) Whether the affidavit of Charles Urse, M.D., is admissible; and (2) whether correspondence between the plaintiff's counsel and Dr. Urse's claims representative is admissible."

Urse and Kowalski as to the presence of Dr. Urse in the emergency room at 3:05 p.m. when the patient went into fatal respiratory and cardiac distress, and where the medical records, answers to interrogatories referencing those records, and other documentary materials suggested that there was no doctor present until after the patient's condition calamitously deteriorated.

Counterstatement of the Standard of Review

Appellate review of evidentiary rulings admitting or excluding evidence is generally for abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998); *In re Archer*, 277 Mich App 71, 77; 744 NW2d 1 (2007); see also MRE 103(a); MCR 2.613(A). In *People v Babcock*, 469 Mich 247, 269; NW2d 231 (2003), this Court stated:

At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes. [Citations omitted].

This Court subsequently adopted the *Babcock* test as the default abuse of discretion standard in *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006)¹⁰.

¹⁰ Dr. Kowalski posits an essentially identical general standard of review based on *People v Musser*, 494 Mich 337, 348; 835 NW2d 319 (2013), and contends that the "Court of Appeals did not have the benefit of this most recent statement of the applicable standard of review applicable to evidentiary rulings * * * ." (Appellant's Brief, p. 18). But *Musser* itself did not purport to establish a new standard; it merely cited cases from 2003, 2008, and 2002 (*viz.*, *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003); *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008), and *People v Krueger*, 466 Mich 50, 54; 643 NW2d 223 (2002))—respectively, 9, 4, and 10 years before the Court of Appeals' decision in this case. Notably, none of the 4-10 year old cases cited in *Musser* were referenced in Dr. Kowalski's brief in the Court of Appeals, either in discussion of the standard of review (64b-65b), or elsewhere (*id.*, 61b-63b). Nor did Kowalski cite any of those cases in his application for leave to appeal to this Court. So this red-herring contention represents a complete change of position, and demonstrates that Dr. Kowalski is impermissibly attempting to raise a new, unpreserved issue on leave granted—this Court flatly refused to even accept a brief addressing an unpreserved issue in *Whitman v City of Burton*, 824 NW2d 568 (2013) (inexplicably omitted from 493 Michigan Reports); in *Bitar v Wakim*, 456 Mich 428, 435 n. 2; 572 NW2d 191 (1998), this Court, after inviting briefing on an issue, "concluded that it should not depart from the [*footnote 10 continues on next page*]

However, preliminary questions of law pertinent to the admission of evidence are reviewed de novo. *Dep't of Transportation v Frankenlust Lutheran Congregation*, 269 Mich App 570, 575; 711 NW2d 453 (2006). Furthermore, to the extent such an inquiry requires examination and interpretation of the rules of evidence, the question becomes one of law that is also reviewed de novo. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). Additionally, questions of law in general are reviewed de novo. *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 612; 684 NW2d 800 (2004).

Indeed, this Court has repeatedly held that whether evidence is admissible, as contrasted with whether evidence was properly admitted or excluded, is always a question of law reviewed de novo. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003) and cases there cited. This standard of review applies alike in civil cases as well. *Henning v McEuen*, 332 Mich 104, 111; 50 NW2d 734 (1952); *In re Bradley's Estate*, 223 Mich 312, 315; 193 NW 897 (1923); *In re Kramek Estate*, 268 Mich App 565, 573; 710 NW2d 753 (2005). This important distinction

[footnote 10 continued from previous page] well-established rule that issues not presented to the trial court or the Court of Appeals are not preserved for review by this Court.” Accord: *Long v Pettinato*, 394 Mich 343, 349; 230 NW2d 550 (1975). Indeed, appellant has *conspicuously* failed to show as required by MCR 7.212(C)(7) and 7.306(A) where and how he preserved this issue for review. Moreover, although appellant did contend at trial there was no actual inconsistency between Dr. Urse’s affidavit and his trial testimony (607a), his counsel previously admitted the issue of inconsistency was for the jury (111a), AND the trial court actually allowed Dr. Urse to be impeached on this basis (but excluded the actual affidavit and contextually surrounding documents) (134a-135a; 139a, 623a-624a). So it is Dr. Kowalski who must establish an abuse of discretion in that regard, yet failed to preserve any such issue for review.

And, contrary to the claim (Appellant’s Brief, p. 18) that “the Court of Appeals incorrectly used a de novo standard of review when it issued its opinion in 2012”, the Court of Appeals expressly posited that its review of evidentiary rulings was for abuse of discretion, except as to construction of constitutional provisions, rules of evidence, court rules or statutes, and it likewise referred to the harmless error standard. (29a) The Court of Appeals’ summary of the standard of review was absolutely correct, as demonstrated in this Counterstatement, and appellant’s claim that it “incorrectly used a de novo standard of review” is so completely lacking in record support as to amount to a deliberate, false representation in violation of both MCR 2.114(D) and MCR 7.316(D)(1)(b).

between “admissible” and “properly admitted or excluded”, the former being a legal question, the latter one of discretion, was presumably in this Court’s collective consciousness when it framed the two questions posed in the order granting leave herein as whether the Urse affidavit and related contextual correspondence “is admissible”. Plaintiff-appellee thus understands that this Court, on plenary consideration, will not be second-guessing the Court of Appeals’ determination that the trial court abused its discretion by excluding the evidence because, under the peculiar circumstances of this case, exclusion prevented plaintiff from having a fair trial, and that instead the focus here is on the legal question whether the Urse affidavit and contextual correspondence are admissible or inadmissible.

Finally, the applicability of the attorney-client or work-product privilege is a question of law reviewed de novo on appeal. *Augustine v Allstate Ins Co*, 292 Mich App 408, 419; 807 NW2d 77 (2011).

Legal Analysis

A. The Urse affidavit, the contextual letters which engendered it, and the testimony of the insurance representative are all properly admissible as relevant evidence, MRE 402, at least for impeachment purposes.

The legal question as to the admissibility of Dr. Urse’s affidavit, and the contextual correspondence surrounding it, is one which this Court has many times previously addressed, resolved, and not previously seen fit to revisit as though it were writing on a clean slate. Each time, the Court held that documentary impeachment evidence is admissible, and the jury must be allowed to see it and to draw its own conclusions. The first such case was *Hamilton v People*, 29 Mich 195, 198 (1874), where this Court, in reversing a judgment of conviction and ordering a new trial, said (boldfaced emphasis supplied):

The party attempting to attack a witness as false, and to show his falsehood by his self-contradictions, cannot be deprived of a right essential to his own safety, by any

considerations of delicacy to others which will stifle the truth. **And inasmuch as the impeachment here was by a written statement signed by the witness, the practice would not permit him to be asked whether he made particular statements in it, but when identified, the writing must be put in as a whole, and must speak for itself.**--2 Phil. Ev., 963-4; *Lightfoot v People*, 16 Mich 507. Any explanations which he might be at liberty to make as to its genuineness or correctness would not remove the necessity of submitting the entire document.

Seven years later, in *De May v Roberts*, 46 Mich 160, 163; 9 NW 146 (1881), this Court asserted that it had "repeatedly pointed out the proper practice in such cases [*i.e.*, to impeach a witness by placing a prior affidavit in evidence]. *Hamilton v People*, 29 Mich [at] 198 and cases cited."

Next was *Krolik v Graham*, 64 Mich 226, 229; 31 NW 307 (1887), where this Court gave the question of admissibility of a document used to impeach a witness on cross-examination short shrift, the correct answer—entirely admissible—being by that time obvious:

Objection was made to the introduction of Jacobson's letter of December 18th. This came in as a part of Jacobson's cross-examination, after he had denied giving any such advice as the letter contains. It was legitimate cross-examination, and we can see no ground for not so regarding it. It came within the lines of his examination, and was important, not only as part of the series of transactions, but also to test the accuracy of his memory or his veracity, being admissible for either purpose.

This Court in *Krolik* went on to address issues related to the context of the referenced Jacobson letter, which is especially pertinent to the admissibility of the letters exchanged between plaintiff's counsel and Dr. Urse's insurance representative. As earlier noted, Dr. Urse's affidavit did not come into existence *ex nihilo*; not being in direct communication with Mr. Weiner, Dr. Urse could not conceivably have known that an affidavit was needed from him except through Ms. Croze. Whether Dr. Urse saw Weiner's letter is irrelevant; it suffices that Ms. Croze apprised Dr. Urse that, in order to extricate him from a possible malpractice lawsuit, Dr. Urse must supply an affidavit, the parameters of which she must have laid out for him. Only after she explained to Dr. Urse what Mr. Weiner needed, and then reviewed what Dr. Urse produced in that light, could she in turn have represented to Mr. Weiner that she was "confident

that this document will meet your needs" (and in that assessment, she was correct).

The admissibility of the correspondence between Mr. Weiner and Ms. Croze, where it is not merely useful, but indispensable to put the Urse affidavit in its proper context, so the jury can properly evaluate whether, as he claimed at trial, Urse thought the timeline unimportant when he created the affidavit, and thus was not contradicting himself when he provided a testimonial timeline vastly different than what was understood by Mr. Weiner from the affidavit, is fully supported by this Court's further holding in *Krolík*, 64 Mich at 229-231 (emphasis supplied):

It may be proper to refer again more particularly to this letter, and the circumstances under which it was written. It appears from the plaintiffs' proofs that it was written on the day after the mortgages were given, and on the day Jacobson arrived in Detroit, and that he had given full explanations to the plaintiffs of the mortgage and its purpose, including an expectation of further goods, if needed. There is other testimony in the case, but contradicted, that on this occasion one of the firm of plaintiffs, almost simultaneously with the letter, stated to Mr. McGraw (who, as a creditor, had come in to make inquiries) that the mortgage was given for a debt equal to its face, and that Jacobson had guarantied the account, and taken a mortgage to secure that as well as his own. In the same interview, Jacobson represented his own mortgage to be for no more than was due, and that plaintiffs' mortgage was fully due. Upon these representations Mr. McGraw offered to sell out his own claim for 50 cents on the dollar, and Jacobson and plaintiffs appear to have proposed arrangements which would have taken it up. Why they were not completed does not clearly appear.

It is not for us to settle disputed facts, or to consider what we might have done had we been jurors. The only question in regard to this letter remaining is whether the request asked should have been granted. **It is true that all the witnesses for plaintiffs indicate that plaintiffs had no knowledge or concern about this letter; but whether or not there were circumstances which might bear a contrary meaning is a different thing.** The request was open to the criticism of being altogether too broad. The court charged very strongly that plaintiffs could not be held for the fraud intended or perpetrated by the other parties, unless they also had a fraudulent intent. Whether this letter showed any fraudulent intent in plaintiffs or not, it certainly tended to show the bad faith of the mortgage, so far as Jacobson, Zemon, and Sable were concerned, which was a main issue. The court could not have been required to give this request as it was asked, and therefore it was not error to say nothing directly about it.

But we think there were circumstances which had some tendency to connect plaintiffs with it. It was written in plaintiffs' office, after a conference upon the mortgage, and contained direct reference to the proposed furnishing of goods, which had been considered in that conference. It contained cautions to explain the taking of the mortgage as connected with a guaranty by Jacobson, which had, according to Mr.

McGraw, been stated to him by one of the plaintiffs, and so done to persuade him of the validity of the mortgage, and answer doubts which might have arisen from what would otherwise look like intermeddling. It reiterates the same representations made, as Mr. McGraw says, by both parties to him, concerning the amount of the debts, and urged that they should be made to creditors generally. It also purported to convey a message or assurance on behalf of plaintiffs. **We are not able to say that a letter written under such circumstances, by the man who had acted for all parties, in the office of plaintiffs, stating what both had adopted as their scheme to influence creditors, and conveying suggestions which infer a common purpose, might not have been legitimately referred by the jury to a common origin, in spite of assurances to the contrary. If so, it is not our province to weigh the facts.**

Krolik clearly recognizes that *all* such evidence is admissible, and it is for the jury to weigh the competing explanations and find where the truth lies.

Bearing in mind, also, that the trial court totally excluded the disputed documents from evidence (and likewise barred plaintiff from producing either Ms. Croze or Mr. Weiner as a rebuttal witness), instead of admitting the evidence and instructing the jury to consider it only for a limited purpose, such as impeachment, the manifest error in deeming the evidence inadmissible is exemplified by the next case on point from this Court, *McKnight v Detroit & M Ry Co*, 135 Mich 307, 309-310; 97 NW 772 (1904):

Plaintiff, on the cross-examination of this and other witnesses of the defense, showed to the witnesses a statement which was substantially a copy of the bill of particulars of the plaintiff for services rendered, and the witnesses were asked whether they had not, when this paper had been exhibited to them previous to the trial, stated that the charges contained therein were reasonable; and, after showing that such statements had been made, the paper was offered in evidence and received. Error is assigned upon this ruling. The circuit judge limited the testimony to the single purpose of contradicting the witnesses, and for this purpose we think it was competent.

There are many more such cases in the same vein, including *People v Salimone*, 265 Mich 486, 500; 251 NW 594 (1934); *Gilchrist v Gilchrist*, 333 Mich 275, 282; 52 NW2d 531 (1952) and *Carlson v Brunette*, 339 Mich 188, 194; 63 NW2d 428 (1954). In each of these decisions, this Court either upheld admission of such evidence, or found error when such evidence was excluded. In *Salimone, op cit*, this Court made the following trenchant observation

which applies equally to the present case (boldfaced emphasis added):

Here the witness had made a prior report to a superior officer relating to the occurrences involved on the night of the shooting. Defendants had a right on cross-examination to call out the fact that such statement had been made, to lay the same before the jury, for the purpose of modifying, explaining, or contradicting the testimony of the witness. A witness may be impeached by showing on cross-examination the improbability of his story, and **in no way may such improbability be better established than by showing on cross-examination prior inconsistent statements of the witness.** Here the statement of the witness was in writing, not in the possession of the defendant, presumptively in the control of the people, its contents unknown to defendant; and it was clear error not to permit defendant to have all of the witness' prior statements bearing upon the question in issue. **To withhold part of his statements was to say to defendant and to the jury, 'You must be content with part of the truth and not the whole truth in relation to the question in controversy.'**

By the time of *Hileman v Indreica*, 385 Mich 1, 17-18; 187 NW2d 411 (1971), this Court's commitment to the rule of *Hamilton v People*, *supra*, was unshakeable:

The rule appears most recently and at length in *People v Dellabonda* (1933), 265 Mich 486, concluding at 508; 251 NW 594 at 601:

'This court is firmly committed to the doctrine of *Queen's Case*, 2 Brod & Bing (284) 286 (129 Eng Repr 976), which case is the basis of the rule stated in 1 Greenleaf on Evidence (16th Ed), ¶463, that it would be unfair to cross-examine a witness as to the contents of a writing made by him until the jury were informed of the precise contents of the writing, and thus warned against assuming contradictions that do not really exist and which would also be unfair to the witness because he may have explanations which would not occur to him until his memory had been refreshed by hearing the paper read. *Lightfoot v People*, 16 Mich 507; *Hamilton v People*, 29 Mich 195; *Toohey v Plummer*, 69 Mich 345; 37 NW 297; *DeMay v Roberts*, 46 Mich 160; 9 NW 146 (41 Am Rep 154).'

^{FN3} To this point see the separate opinion of Kavanagh, J., in *People v Knox* (1961), 364 Mich 620, 636; 111 NW2d 828.

None of these cases has ever been overruled as to this question of admissibility. The identical rule should be applied here as in other cases—plaintiff, bearing the burden of proof, was not obligated to present her case on some theory of “alternative proofs”, where testimony (of adverse witnesses, no less) substitutes for documentary evidence possessing unequalled probative value. *People v Eddington*, 387 Mich 551, 562; 198 NW2d 297 (1972); *People v*

Mills, 450 Mich 61, 72; 537 NW2d 909 (1995); *Hamilton v People*, *supra*.

It remains possible that, in promulgating the Michigan Rules of Evidence in 1985, this Court, intentionally or otherwise, *sub silentio* overruled this unbroken chain of authorities. But examination of the MREs negatives this purely theoretical possibility. MRE 613 provides:

(a) Examining witness concerning prior statement

In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

Clearly, MRE 613(a) has somewhat modified the procedure approved in *Hamilton v People*, *supra*, but it does nothing to change the admissibility of such prior inconsistent statements. Similarly, with respect to the letters exchanged between Mr. Weiner and Ms. Croze, MRE 613(b) requires that Dr. Urse be given an opportunity to explain or deny with reference to what occurred when Ms. Croze requested that Dr. Urse prepare an affidavit; plaintiff was at all times willing to do this, and MRE 613(b) has nothing to do with the reasons advocated by counsel for Dr. Kowalski, or reasons propounded by the trial court, for deeming such evidence inadmissible.

Also relevant is MRE 801(d)(1)(A), which provides:

(d) Statements which are not hearsay

A statement is not hearsay if:

(1) *Prior statement of witness*. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition

The Urse affidavit was clearly provided under oath, the very quiddity of an affidavit. 3 Am Jur 2d, Affidavits, §10 ("If a declaration has in fact been made under oath, it is an 'affidavit'

although no jurat may be attached.”). As held in *Detroit Leasing Co v City of Detroit*, 269 Mich App 233, 236; 713 NW2d 269 (2005):

For a document to constitute a “valid affidavit,” it must be: “(1) a written or printed declaration or statement of facts, (2) made voluntarily, and (3) confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.” *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 711; 620 NW2d 319 (2000).

Urse’s affidavit was supplied at the Notice of Intent, MCL 600.2912b, stage of this medical malpractice lawsuit, after an initial notice of intent had been served on Dr. Kowalski and Trinity Health-Michigan (28b-45b), and thus during the mandatory waiting period of MCL 600.2912b(1). Although no complaint had yet, or could have been, filed, the “proceeding” had commenced. *Oesterle v Wallace*, 272 Mich App 260, 268; 725 NW2d 470 (2006) (allegedly defamatory statement in settlement letter, made in context of probate litigation, held “properly characterized as having been made during judicial proceedings” and thus absolutely privileged). This is because “proceeding” contemplates “every step” along the way and “covers anything that may be said in relation to the matter at issue, including pleadings and affidavits”. *Couch v Schultz*, 193 Mich App 292, 294; 483 NW2d 684 (2002). Accord: *Ewin v Burnham*, 272 Mich App 253, 258; 728 NW2d 463 (2006), where the Court of Appeals held that a Texas’ pre-suit deposition constituted a “proceeding” for purposes of invoking the aid of a Michigan witness subpoena under MCL 600.1852(2) (boldfaced emphasis added):

MCL 600.1852 explicitly uses the term “proceeding” instead of “action.” Thus, by its plain language, it authorizes courts in this state to order a person domiciled in Michigan to submit to a deposition for use in “any proceeding” before a court in another state. In Michigan, a “proceeding,” in a general sense, is “ ‘the form and manner of conducting juridical business before a court or judicial officer.’ ” *People v Bobek*, 217 Mich App 524, 530; 553 NW2d 18 (1996), quoting Black’s Law Dictionary (6th ed). A “proceeding” “apparently encompasses all matters brought before a court in a specific judicial action.” *Id.* In Texas, a Rule 202.1 procedure is a proceeding as defined by Michigan law. The procedure, authorized by Texas law, provides access to Texas courts to perform specific judicial actions before suit. **The presuit procedure is a sanctioned**

court proceeding, a step in the judicial process. Because MCL 600.1852 authorized the trial court herein to order respondent to testify for use in the Texas proceeding, we find no error that would require defendant to obtain relief by way of sealing the deposition pursuant to a protective order.

To like effect, see *People v Weathersby*, 204 Mich App 98, 106; 514 NW2d 493 (1994), where “preparatory actions” under MCL 777.3 were held to come within the ambit of a “proceeding”. “The term ‘proceeding’ is broad enough to encompass within its ordinary meaning all steps taken toward a given end.” In *Matter of Hanson*, 188 Mich App 392, 397; 470 NW2d 669 (1991), the Court held that an adult adoptee’s request for information concerning her biological parents (whose rights had long ago been terminated) was a “subsequent proceeding” for purposes of the Indian Child Welfare Act, 25 USC §1923. Similarly, condemnation, although not a judicial proceeding, is nonetheless a “proceeding”. *In re Widening of Michigan Ave from 14th Ave to Vinewood Ave*, 299 Mich 544, 549; 300 NW 877 (1941).

The upshot of this necessarily length discussion of “proceeding” establishes that Dr. Urse’s affidavit does come within the ambit of MRE 801(d)(1)(A), and is therefore not inadmissible as hearsay (so it is substantively admissible, in addition to being admissible for impeachment purposes). Indeed, it would be more than strange had this Court barred impeachment of witnesses by the use of prior written statements generally, or by prior sworn written statements in particular. Of course, nothing in MRE 801 does anything of the kind; even if Urse’s affidavit were hearsay, it would still be admissible for impeachment purposes; because it is NOT hearsay, it is substantively admissible since even Dr. Kowalski does not contend that the affidavit is not relevant. MRE 402.

For the sake of completeness, the trial court further erred in accepting the contention of Dr. Kowalski that Ms. Croze’s testimony was inadmissible because privileged. As to the letters between Ms. Croze and Mr. Weiner, the defense objection was predicated solely on

hearsay (318a). But the letters were not offered to prove the truth of anything contained therein, only to explain and place in context the affidavit of Dr. Urse, and so were not hearsay by definition. MRE 801(c); *Union Planters Bank v Crook*, 225 Ga App 578, 582; 484 SE2d 327, 332 (1997). “Statements offered to show that they were made or to show their effect on the listener are not hearsay.” *Hilliard v Schmidt*, 231 Mich App 316, 318; 586 NW2d 263 (1998). Indeed, in the specific context of statements by the agent of an insurer, offered for a purpose other than proving the truth of the statement, the hearsay bar is inapposite. *Haynes v Branham* (Mich App No 243076, released January 13, 2004), slip op p. 3 (52b per MCR 7.215(C)(1)) (boldfaced emphasis added):

Defendant asserts that the alleged statement from the Titan employee would be inadmissible hearsay since it would not qualify as the statement of a party’s agent under MRE 801(d)(2)(D) since it came from the insurance agency, which was not an agent of Titan. * * * **Moreover, this statement is being offered to show that the representation was made, not to show that Titan would have accepted the premium if paid before the 22nd. Since it will not be offered for the truth of the matter asserted, it will not be barred as hearsay.** See MRE 801(c).

The defense at one point asserted—in support of its successful objection to plaintiff’s proffered rebuttal evidence—that Ms. Croze could not testify, and that her files were protected from both subpoena and production, by virtue of either attorney-client or work product privileges. Those arguments were not well taken—her letter to Mr. Weiner was not privileged in any manner, shape, or form, as it was written to an attorney known to be opposing one of the same insurer’s policyholders (Dr. Kowalski) and then considering suing a second policyholder (Dr. Urse). Such material, intended to be disclosed or sent to an adverse party or adverse party’s representative, is entirely outside the scope of any privilege. As recognized in *Yates v Keane*, 184 Mich App 80, 83; 457 NW2d 693 (1990):

A communication is not confidential if it is made for the purpose of disclosure to third parties. *Owen v Birmingham Federal Savings & Loan Ass’n*, 27 Mich App 148, 163; 183

NW2d 403 (1970).

Thus, neither the letter from Ms. Croze to Mr. Weiner, nor her subsequent *and consequent* efforts to obtain an affidavit from Dr. Urse to satisfy Mr. Weiner's request, were within the scope of any recognized privilege, and the trial court exacerbated its earlier errors by barring plaintiff from calling Ms. Croze as a rebuttal witness¹¹ to explore this very topic, and from introducing the two letters that led to Dr. Urse creating his affidavit.

Mr. Weiner was of course also a proper witness to identify his letter to Ms. Croze—the authenticity of that letter was not in dispute. MRPC 3.7(a)(1) and (b). As plaintiff was also represented by Mr. Sanfield throughout the trial, if the defense insisted on witness authentication of Mr. Weiner's letter to Ms. Croze as a precondition to admitting it in evidence, the trial court further erred in barring Mr. Weiner's testimony (1204a), and in again rejecting the letter, which was highly important and relevant impeachment evidence.

Moreover, while there could not be any attorney-client privilege as to Ms. Croze's files or testimony (with regard to discussions with Dr. Urse), *Koster v June's Trucking, Inc.*, 244 Mich App 162, 166-167; 625 NW2d 82 (2000), any work-product privilege would first require identifying some document created in anticipation of litigation and in cooperation with legal counsel, MCR 2.302(B)(3). But Dr. Urse's affidavit was created *in anticipation of avoiding litigation*, and not in cooperation with legal counsel or as part of any trial preparation or strategy. Moreover, a claim of work-product privilege requires the insurer first to produce the file for *in camera* inspection by the trial judge, accompanied by service of a list or index of file contents

¹¹ Moreover, the rule is well established that, under preferred practice, a witness cannot avoid taking the witness stand merely because there may be a valid privilege to assert (especially if only as to some subjects of inquiry). Rather, the privilege must be asserted in response to actual questions after the witness is once duly sworn and on the witness stand. *Blake v Consolidated Rail Corp.*, 176 Mich App 506, 520 n. 1; 439 NW2d 914 (1989).

sufficient to allow plaintiff's counsel to formulate arguments as to why such privilege does not apply to any or all identified documents. *Koster, supra*, 244 Mich App at 170-172. Here, the trial court, without any such review of actual insurer records *vis à vis* work product privilege, flatly barred plaintiff from adducing any evidence from APAC, testimonial or documentary.

The foregoing incontrovertibly demonstrates that the specific issues concerning admissibility which underlie the granting of leave to appeal have been long settled in Michigan jurisprudence, in a manner entirely consonant with the Court of Appeals' direction for a new trial at which such evidence shall be admitted for the jury's evaluation. Accordingly, plaintiff respectfully suggests that leave to appeal was improvidently granted and should now be denied, before this Court wastes any more scarce judicial resources on questions having nothing useful to contribute to the development of Michigan jurisprudence.

B. The trial court's exclusion of the Urse affidavit and contextually surrounding documents and testimony, preventing such evidence from being seen or considered by the jury, denied plaintiff a fair trial and constituted an abuse of discretion.

As indicated earlier, plaintiff does not anticipate that this Court will second-guess the Court of Appeals' determination that a new trial is required in the interests of justice. However, *in utrumque paratus*, should undersigned counsel's reading of the tea leaves prove incorrect, that secondary issue will now be addressed.

Two weeks before trial, on January 25, 2010, during a hearing on plaintiff's motion in limine, the trial court clearly indicated it would freely allow plaintiff to challenge the credibility of Drs. Kowalski and Urse's claim that Dr. Urse was present in the ER when Dr. Kowalski left Room 11 to attend another critical ER patient and before Mrs. Johnson went into fatal respiratory distress, by which time it was too late or impossible to intubate Mrs. Johnson, and time was fatally lost restoring an airway by means of surgery (cricothyrotomy). (149a). For this purpose,

the affidavit of Dr. Urse and the correspondence between Dr. Urse's insurance representative and plaintiff's counsel, which outline their mutual understanding as to the issues to be addressed in the affidavit in order to extricate Dr. Urse from possibly being sued, and which led to the affidavit being created, were recognized as the basis for impeaching the two doctors. Moreover, at the same motion in limine hearing, defense counsel indicated that there would be no last minute motions, and that trial could commence as soon as a jury was selected. (160a).

Plaintiff's counsel prepared for trial in reliance on this understanding, only to find they had been sandbagged. After jury empanelment, the trial court ruled, first, that plaintiff could not refer to the preliminary correspondence at all during trial, and could not show the jury a copy of Dr. Urse's affidavit in opening statement (603a, 606a-607a, 623a; 1212a). Then during cross-examination of Dr. Urse, plaintiff was again barred from showing the jury a copy of the affidavit or introducing the affidavit into evidence, ostensibly on the basis of MRE 613(b).

However, MRE 613(b) directly contradicts the trial court's exclusionary ruling:

(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

Dr. Urse was afforded ample opportunity to explain his affidavit. The affidavit itself thereupon became admissible in evidence for impeachment purposes. MRE 105. As held in *Law Offices of Gerald M Stevens v Larose* (Mich App No 197299, released December 30, 1997), slip op p. 3 (55b per MCR 7.215(C)(1)):

Second, plaintiff attempted to rely on a transcript of a hearing before a bankruptcy trustee in which Shirley Larose made certain statements regarding her intent in conveying the subject property. The trial court refused to consider the transcript. While this may have been proper for purposes of ruling on a motion for summary disposition, Shirley's prior statements, made while under oath, are admissible at trial on remand to the extent

allowed under MRE 613(b) and MRE 801(d)(2).

The defense objected to admission only on grounds of hearsay, but by admitting the document for impeachment only and instructing the jury accordingly, the hearsay objection would have been obviated because the jury would not have regarded the affidavit as substantive evidence. Per *Bradbury v Ford Motor Co*, 123 Mich App 179, 187-188; 333 NW2d 214 (1983):

The document was not admissible under MRE 803(4)^[FN7, quoting MRE 803(4), omitted] because the statement was not made for the purpose of medical treatment or diagnosis. * * *. It was, however, admissible under MRE 613(b)^[FN8, quoting MRE 613(b), omitted] for impeachment purposes. The trial court here apparently admitted the statement under that rule as a prior inconsistent statement. The plaintiff's prime objection to the court's action is that he denies making the statement. This does not render the statement inadmissible, though. If there is sufficient evidence to support a finding that the plaintiff made the statement, it is admissible. MRE 104(b). A hospital employee testified that the "patient history" was derived from the patient's (plaintiff's) statements to an intern. This is sufficient to support a finding that the plaintiff made the statement. This does not conclusively mean that the plaintiff made the statement—if he denies it, a jury question of credibility is raised. MRE 104(e). A witness is not required to verify he made the statement before it can be admitted in evidence. MRE 613(b). The witness must be afforded an opportunity to deny or explain the statement, MRE 613(b), and plaintiff was given that opportunity. We, therefore, find that the statement was properly admitted for impeachment purposes under Rule 613(b).

Dr. Urse's affidavit was, by general agreement of both counsel and the trial court, less than a model of clarity. However, given that it was produced in response to correspondence between plaintiff's counsel, Mr. Weiner, and Dr. Urse's malpractice insurance representative, Ms. Croze, and notwithstanding that Dr. Urse denied having seen the actual correspondence, the letters were necessary to an understanding of the context that generated the affidavit. The affidavit did not emerge "out of the blue", and it was not created *sua sponte*; Dr. Urse admitted that he produced the affidavit in response to a request from his insurance representative. As in *Bradbury, supra*, whether Dr. Urse saw the actual correspondence is not necessary to the admissibility of the letters; having given Dr. Urse an opportunity to deny or explain his affidavit, the letters were relevant, MRE 401, and admissible to give context to the affidavit they produced,

MRE 402. Ms. Croze's testimony would perhaps have been even more probative than the letters as to what Dr. Urse was informed he should do in relation to creating an affidavit, but plaintiff, who had subpoenaed her to testify, was prevented from summoning her to the witness stand as well as barred from introducing the written correspondence.

The two letters made clear that the key issue for Dr. Urse to address in any affidavit was whether he was present in the ER attending decedent before she went into respiratory arrest or only afterwards. Dr. Urse's verbal meanderings could, on one view at least, take on a meaning like that attributed to the affidavit by plaintiff's counsel—Dr. Urse was not present until after the critical moment, his affidavit confirmed that fact, and on that basis he avoided being sued for malpractice. But the jury was precluded from reaching such a conclusion or evaluating Dr. Urse's credibility either by examining the affidavit itself, or the correspondence engendering it.

As to the letters, the defense objection was again predicated on hearsay (318a). But, as noted above, the letters were not offered to prove the truth of anything contained therein, only to explain contextualize the affidavit of Dr. Urse, and so were not hearsay by definition. MRE 801(c). "Statements offered to show that they were made or to show their effect on the listener are not hearsay." *Hilliard v Schmidt*, *supra*, 231 Mich App at 318; *Haynes v Branham*, *supra*.

A further disturbing aspect of the trial court's handling of this key evidentiary conflict is that Drs. Kowalski and Urse were permitted freely to contradict or "imaginatively augment" the medical records by their testimony, both those records created by the nursing staff and their own contemporaneous notes—after each, under oath, relied on them during pretrial phases. When a plaintiff predicates a medical malpractice case on expert testimony that discounts or negatives anything in the medical records, under controlling precedent that leads, as a matter of law, to summary disposition for the defendant, a directed verdict for the defense, or reversal of a

favorable jury verdict, on grounds such evidence is not a legally sufficient basis for a verdict. The justification for this principle was developed in *Badalamenti v Wm Beaumont Hosp—Troy*, 237 Mich App 278, 286-289; 602 NW2d 854 (1999)¹²:

This Court has held that an expert's opinion is objectionable where it is based on assumptions that are not in accord with the established facts. *Green v Jerome-Duncan Ford, Inc*, 195 Mich App 493, 499; 491 NW2d 243 (1992); *Thornhill v Detroit*, 142 Mich App 656, 658; 369 NW2d 871 (1985). This is true where an expert witness' testimony is inconsistent with the testimony of a witness who personally observed an event in question, and the expert is unable to reconcile his inconsistent testimony other than by disparaging the witness' power of observation. *Green, supra* at 500.

Additionally, medical records are strictly protected by law. It is a felony for a health care provider to falsify a medical record or to direct another person to do so, or to destroy a medical record not otherwise preserved in its original form or to supplement a medical record without revealing the alteration. MCL 750.492a(1)(a), (2), and (3)(a) and (b).¹³

Now that the shoe is on the other foot, and a defendant doctor rather than a med-mal plaintiff wishes to disavow the medical records, revise them, or augment them, including both those records created by nurses who were eyewitnesses to the events so recorded *and to a lesser extent as to those contemporaneous records created by the doctors themselves*—and despite the fact Dr. Kowalski testified he does not recall whether Dr. Urse was present before he left Room 11 to attend another patient in Room 9 (816a) (even assuming *arguendo* that such defense tactic is permissible under *Badalamenti*) —plaintiff must be allowed full and fair opportunity to

¹² Plaintiff considers the *Badalamenti* line of authority as one representing sophistry and bad law, but plaintiff is the appellee here, and so merely notes this case law to insure that there are not different rules for plaintiffs and defendants in medical malpractice cases contrary to the constitutional principle of equal justice under law. *Cooper v Aaron*, 358 US 1, 19-20; 78 S Ct 1401, 1410; 3 L Ed 2d 5 (1958); *City of Detroit v Detroit Police Officers Ass'n*, 408 Mich 410, 529; 294 NW2d 68 (1980) (Levin, J., Coleman, CJ, and Kavanaugh, J, dissenting).

¹³ While MCL 750.492a(3)(c) expressly states that the statute does not provide a basis for a civil cause of action, that does not preclude relying on such improper actions to support another cause of action under a different statute or recognized legal theory, e.g., medical malpractice. MCL 750.4; *Dresden v Detroit Macomb Hosp Corp*, 218 Mich App 292, 299; 553 NW2d 387 (1996).

challenge such a defense, without being hamstrung at every turn so as to leave the jury with a false impression as to the extent to which the doctors' testimony deviates from the official record and the particulars by which the original records and their prior inconsistent statements were established. *Krolik v Graham, supra*. The trial court's exclusionary rulings were legally erroneous and also constituted an abuse of whatever discretion it had, and substantially interfered with plaintiff's right to a fair trial by skewing the jury's view of the conflicting evidence regarding the central issue of whether there was a doctor in attendance upon decedent at all times after her arrival at the Cadillac ER. "An error may be intolerably offensive to the maintenance of a sound judicial system ... if it deprived the [plaintiff] of a fundamental element of the adversarial process." *People v Furman*, 158 Mich App 302, 318; 404 NW2d 246 (1987).

C. Dr. Kowalski's Contentions Are Erroneous, Misleading, and Do Not Warrant Reversing the Court of Appeals' Direction for New Trial

In 31 pages of argument correctly labeled as such, Dr. Kowalski propounds a panoply of demonstrably false or misleading propositions.

1. Dr. Kowalski misrepresents the "governing law" (Kowalski's brief, pp. 19-25)

On p. 19 of his brief, Kowalski asserts that "the statements in the affidavit were inadmissible to impeach Dr. Urse because they were not inconsistent with his testimony at trial." Appellant goes on to contend that "the question of inconsistency * * * is one within the discretion of the trial judge, and a statement is only inconsistent where it 'directly tends to disprove the exact testimony of the witness.' *People v Allen*, 429 Mich 558, 650; 420 NW2d 499 (1988) (Riley, CJ, dissenting); * * *" Before trial, defense counsel conceded the issue was one for the jury to resolve as trier of fact (111a).

Aside from the fact that (a) this issue is not preserved (see below, p. 46) and (b) *Allen* is a dissenting opinion, *Allen* is not persuasive; there, the late Chief Justice wrote:

As a general rule, the only contradictory evidence that is admissible for impeachment purposes is that which directly tends to disprove the exact testimony of the witness. *People v McGillen* # 1, 392 Mich 251; 220 NW2d 667 (1974)¹⁴; *People v Johnson*, 113 Mich App 575, 579; 317 NW2d 689 (1982)¹⁵. The question of inconsistency is one within the discretion of the trial judge. *People v Graham*, 386 Mich 452, 457; 192 NW2d 255 (1971)¹⁶. In the instant case, I am not persuaded that the trial judge abused his discretion in ruling that Dougherty's trial testimony was not inconsistent with her testimony at the preliminary examination. Although Dougherty's preliminary examination testimony contained certain details about defendant's clothing which she was unable to recall at trial, her trial testimony was not inconsistent, but rather, it appears to reflect a lapse in memory. Similarly, at the preliminary examination, complainant testified that she could not recall if defendant had asked her to consent to a sexual act and subsequently testified at trial that he did not. Considered in the total context of Dougherty's testimony, I do not view these two variances in the testimony as contradictory. Therefore, I conclude that the trial judge's refusal to allow impeachment with the preliminary examination testimony was not an abuse of discretion, thus I would affirm defendant's conviction.

The correct rule is quite different. Professor McCormick, the successor to Professor Wigmore as the preeminent authority on matters of evidence, emulating his mentor, takes the position in 2 McCormick on Evidence (2d ed.) p 68 §34 that the proper test of inconsistency is as follows: "[C]ould the jury reasonably find that a witness who believed the truth of the facts testified to, would have been unlikely to make a prior statement of this tenor." Wigmore propounded a similar test: "Do the two expressions appear to have been produced by inconsistent beliefs?" 3A Wigmore on Evidence §1040 at 1048 (rev ed Chadbourn 1970)¹⁷. Note that this is precisely the section of Wigmore cited indirectly (through *People v Graham*) in then-Chief Justice Riley's dissent in *Allen*, *supra*, on which Dr. Kowalski relies (see footnote 16 below).

¹⁴ *McGillen* dealt with rebuttal evidence which was inadmissible on the main issue but highly prejudicial and inflammatory. 392 Mich at 268. This distinct context reflects limitations on proper rebuttal which have no application to evidence in a party's case-in-chief. See, e.g., *Lexchin v Mathews*, 269 Mich 120, 122; 256 NW 825 (1934).

¹⁵ *Johnson* simply cited *McGillen* and *Graham*, and so adds nothing of value to the analysis.

¹⁶ *Graham* cites *Grunewald v United States*, 353 US 391; 77 S Ct 963; 1 L Ed 2d 931 (1957), which both concerned use of evidence in contravention of the Fifth Amendment privilege against self-incrimination and an *obiter dictum*, which cited 3 Wigmore, Evidence, §1040. That section of Wigmore's seminal treatise stands for a contrary principle, however, as shown below, p. 39.

¹⁷ See footnote 16 above.

Federal courts have tended to agree with the recommendations of McCormick and Wigmore. *United States v Morgan*, 555 F2d 238, 242 (CA9, 1977) (holding government witness' sworn testimony before grand jury and in deposition was admissible both for impeachment and as substantive evidence, and adopting Wigmore-McCormick test for minimal threshold needed to establish "inconsistency"); *United States v Barrett*, 539 F2d 244 (CA1, 1976). For example, a witness' testimony that the defendant had admitted his involvement in the crime has been held inconsistent with the same witness' alleged statement that it was too bad the defendant had been indicted because he knew the defendant was not involved. *Barrett*, *supra*, 539 F2d at 254 The trial court had excluded the prior statement, ruling that it was not inconsistent but was rather a "hearsay opinion ... that this guy is innocent." *Id.* The First Circuit, however, found the two statements inconsistent and reversed, stating, *id.* at 254:

We believe the court erred in excluding this testimony. Counsel for Barrett advised the court, albeit rather succinctly, that the testimony went to the credibility of Adams who had testified. The court ruled it out on the ground that it was a "hearsay opinion by Mr. Adams, that this guy is innocent. That is all this amounts to." * * * However, the clear purport of Adams' direct testimony was that in late October, 1974, after Barrett's arrest, Adams acquired first-hand knowledge of Barrett's involvement in the stamp affair, and the jury could have inferred from this and other testimony that at all times thereafter Adams remained of the impression that Barrett was involved. The statement to Delaney, therefore, made supposedly in November, 1974, was clearly inconsistent. To be received as a prior inconsistent statement, the contradiction need not be "in plain terms. It is enough if the proffered testimony, taken as a whole, either by what it says or by what it omits to say, affords some indication that the fact was different from the testimony of the witness whom it is sought to contradict." *Commonwealth v. West*, 312 Mass. 438, 440, 45 N.E.2d 260, 262 (1942), cited in McCormick, *supra*, §34, at 68 n. 15. Furthermore, the fact that Adams' belief that Bucky was not involved might be called an "opinion" is immaterial. *Id.* §35; see *Ewing v. United States*, 77 U.S.App.D.C. 14, 135 F.2d 633, 642 (1942), cert. denied, 318 U.S. 776, 63 S.Ct. 829, 87 L.Ed. 1145 (1943). The important point is the clear incompatibility between Adams' direct testimony and the alleged statement.

The Government also urges that Delaney's memory of the timing of the statement was uncertain, as well as his memory as to other details. * * * But this possibility is not a ground for keeping the evidence from the jury, which is the principal judge of the credibility of witnesses and the weight to be given to otherwise competent testimony.

As for harmless error as “cumulative evidence” (two more shibboleths for which Dr. Kowalski contends), the First Circuit in *Barrett* went on to say, 539 F2d at 256:

A final question is whether the error was one which affected “substantial rights”, requiring reversal. Fed.R.Crim.P. 52(a). See *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946); 3 C. Wright, Federal Practice and Procedure s 852. The case against Barrett was strong, and we are tempted to say that the proffered testimony was unlikely to have affected the result. Barrett’s defense rested, however, on the notion that Kirzner and Bass were lying in hope of reward and Adams was lying because he, not Bucky, was the real culprit. We cannot say, given Adams’ criminal background, that if Delaney and Kelley had impressed the jury, the credibility of Adams would not have been substantially diminished, and, with this tangible achievement, the defense would not have achieved its goal of raising a reasonable doubt in the minds of the jury. This is not a result we would either look for or, on this record, applaud, but we cannot with certainty say that the error was harmless.

When it comes to whether a party may offer extrinsic evidence, irrespective of whether the witness admits or denies the making of the prior inconsistent statement, no less an authority than the US Supreme Court has stated that “an admission that a contradiction is contained in a writing should not bar admission of the document itself in evidence.” *Gordon v United States*, 344 US 414, 420-421; 97 L Ed 447; 73 S Ct 369 (1953). There, the trial court declined to order the government to produce a witness’ prior inconsistent statement for introduction into evidence by the defense in a criminal trial; the witness was nonetheless impeached on the basis of the prior statement. The defendant was convicted, which judgment was upheld by the Court of Appeals. Finding both that this was error, and that the error was not harmless, the Supreme Court held:

The Court of Appeals affirmed on the ground that Marshall’s admission, on cross-examination, of the implicit contradiction between the documents and his testimony removed the need for resort to the statements and the admission was all the accused were entitled to demand. We cannot agree. **We think that an admission that a contradiction is contained in a writing should not bar admission of the document itself in evidence**, providing it meets all other requirements of admissibility and no valid claim of privilege is raised against it.^{FNI4} **The elementary wisdom of the best evidence rule rests on the fact that the document is a more reliable, complete and accurate source of information as to its contents and meaning than anyone’s description and this is no less true as to the extent and circumstances of a contradiction.** We hold that the accused is entitled to the application of that rule, not merely because it will emphasize the

contradiction to the jury, but because it will best inform them as to the document's impeaching weight and significance.^{FN15} * * * The weight to be given Marshall's implication of the petitioners was decisive. Since, so far as we are now informed by the record, we think the statements should have been admitted, we cannot accept the Government's contention based on a premise that the court was free to exclude them. It was error to deny the application for their production. [Boldfaced emphasis added.]

^{FN14} 3 Wigmore on Evidence, §1037; 3 Wharton's Criminal Evidence (11th ed), §1309.

^{FN15} The best evidence rule is usually relied upon by one opposing admission, on the ground that the evidence offered by the proponent does not meet its standards. Its merit as an assurance of the most accurate record possible commends its extension to this unique situation where it is the proponent who seeks to rely on it.

Prof. Wigmore agrees that no valid reason exists to exclude evidence following the witness' admission, asserting that counsel should be allowed to emphasize the inconsistency. 3A Wigmore on Evidence §1037, at pp. 1044–45 (rev ed Chadborn, 1970). This view is supported by 21 Am Jur, Proof of Facts 2d 101, §13, Substantive admissibility of prior inconsistent statements (cum supp 2013), which summarizes the situation thusly:

Prior inconsistent statements of a witness not a party opponent were admissible at common law solely for purpose of impeachment unless such statement also happened to satisfy a hearsay exception such as that for an excited utterance. With respect to a prior statement admitted solely to impeach, the jury is instructed to consider the statement only as bearing upon the credibility of the witness and not for establishing the truth of the matter asserted. *United States v Rogers* (CA8 Ark) 549 F2d 490, 40 ALR Fed 605, cert den 431 US 918, 53 L Ed 2d 229, 97 S Ct 2182; *Strudl v American Family Mut. Ins. Co.* (CA8 Neb) 536 F2d 242.

Notice, however, that the Federal Rules of Evidence in Rule 801(d)(1)(A) now provide for substantive admissibility of a prior inconsistent statement where the witness testifies at the trial or hearing and is subject to cross-examination concerning the statement, provided the prior statement was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition. The reference to other proceedings includes testimony given before a grand jury.

In *Bradbury v Ford Motor Co*, *supra*, 123 Mich App at 187-188, the Court recognized that under MRE 613(b) a prior inconsistent statement is properly provable through extrinsic evidence, and further held that whether the statement was actually made, and all other such

questions surrounding it, are for the jury to resolve:

It was, however, admissible under MRE 613(b)^[FN8 omitted] for impeachment purposes. The trial court here apparently admitted the statement under that rule as a prior inconsistent statement. The plaintiff's prime objection to the court's action is that he denies making the statement. This does not render the statement inadmissible, though. If there is sufficient evidence to support a finding that the plaintiff made the statement, it is admissible. MRE 104(b). A hospital employee testified that the "patient history" was derived from the patient's (plaintiff's) statements to an intern. This is sufficient to support a finding that the plaintiff made the statement. This does not conclusively mean that the plaintiff made the statement—if he denies it, a jury question of credibility is raised. MRE 104(e). A witness is not required to verify he made the statement before it can be admitted in evidence. MRE 613(b). The witness must be afforded an opportunity to deny or explain the statement, MRE 613(b), and plaintiff was given that opportunity. We, therefore, find that the statement was properly admitted for impeachment purposes under Rule 613(b).

In McCormick, Evidence, §34 we find:

On an appropriate objection, the judge must make a preliminary determination whether the pretrial statement is inconsistent with the witness's trial testimony.^[FN16] What degree of inconsistency between the witness's testimony and his previous statement is required to create a doubt about the witness's credibility? * * * Under the more widely accepted view, any material variance between the testimony and the previous statement suffices.^[FN18] The pretrial statement need "only bend in a different direction" than the trial testimony.^[FN19] For instance, if the prior statement omits a material fact presently testified to and it would have been natural to mention that fact in the prior statement, the statement is sufficiently inconsistent.^[FN20] In the same vein, the impeachment can take the form of a witness's earlier statement disavowing knowledge of facts that he now testifies to.^[FN21] The test ought to be: Could the jury reasonably find that a witness who believed the truth of the facts testified to at trial would be unlikely to make a prior statement of this tenor?^[FN22] The Federal and Uniform Rules of Evidence do not expressly prescribe a test for inconsistency. Under these statutory schemes, most courts apply the more liberal standards.^[FN23] Thus, if the previous statement is ambiguous and according to one meaning inconsistent with the testimony, it ought to be admitted.^[FN24] * * * Instead of restricting the use of prior statements by a mechanical test of inconsistency, in case of doubt the courts should lean toward receiving such statements to aid in evaluating the trial testimony. After all, the pretrial statements were made when memory was fresher and when there was less time for the play of bias. Thus, they are often more trustworthy than the testimony.^[FN25]

[FN16] *U.S. v. Avants*, 367 F.3d 433 (5th Cir. 2004).

* * *

[FN18] *U.S. v. Gajo*, 290 F.3d 922, 931 (7th Cir. 2002) ("the term 'inconsistent' ... should not be confined to 'statements [that are] diametrically opposed or logically incompatible'"); *Udemba v. Nicoli*, 237 F.3d 8, 18 (1st Cir. 2001) ("Statements need not be directly contradictory in order to be deemed inconsistent within the purview of Rule 613(b)"); * * *; *Com. v. West*, 312 Mass. 438, 45 N.E.2d 260, 262 (1942) ("And it is not necessary that there should be a contradiction in plain terms. It is

enough if the proffered testimony, taken as a whole, either by what it says or by what it omits to say, affords some indication that the fact was different from the testimony of the witness whom it is sought to contradict.”); *O’Neill v. Minneapolis St. Ry. Co.*, 213 Minn. 514, 7 N.W.2d 665, 669 (1942) (“Whether a prior statement does in fact impeach a witness does not depend upon the degree of inconsistency between his testimony and his prior statement. If there is any variance between them, the statement should be received and its effect upon the credibility of the witness should be left to the jury.” * * *; White, *The Art of Impeachment and Rehabilitation*, 13 *The Pract. Litigator* 29, 33 (Mar. 2002) (“Modern courts have interpreted the requirement to allow impeachment if at least one inference that may be drawn from the prior statements is that it is inconsistent with the statement testified to at trial”).

[FN19] *McNaught & Flannery*, *Massachusetts Evidence: A Courtroom Reference* 13–5 (1988).

[FN20] *Jenkins v. Anderson*, 447 U.S. 231, 239, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980) (“Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted. 3A *Wigmore*, *Evidence* §1042, at 1056 (Chadbourn rev. 1970)”); * * * *Nomanbhoy Family Ltd. Partnership v. McDonald’s Corp.*, 579 F. Supp. 2d 1071, 1088 (N.D. Ill. 2008) (“impeachment by omission”); *Esderts v. Chicago, R. I. & P. R. Co.*, 76 Ill. App. 2d 210, 222 N.E.2d 117 (1st Dist. 1966) (“If a witness fails to mention facts under circumstances which make it reasonably probable he would mention them if true, the omission may be shown as an indirect inconsistency.”); *State v. Haga*, 954 P.2d 1284 (Utah Ct. App. 1998) (an alibi witness’s failure to come forward before trial); *McElhaney*, *Impeachment by Omission*, 14 *Litigation* 45 (Fall 1987). * * *.

[FN21] *Hoagland v. Canfield*, 160 F. 146, 171 (C.C.S.D. N.Y. 1908); *In re Olson’s Estate*, 54 S.D. 184, 223 N.W. 41 (1929). Similarly, a previous statement denying recollection of facts testified to should be provable. * * * The text should be applicable under the federal rules.

[FN22] *Morgan v. Washington Trust Co.*, 105 R.I. 13, 249 A.2d 48 (1969). See generally *State v. Dickenson*, 48 Wash. App. 457, 740 P.2d 312, 317 (Div. 1 1987) * * * 5 K. Tegland, *Wash.Prac.* § 256 (1982) (quoting *Sterling v. Radford*, 126 Wash. 372, 218 P. 205 (1923)).

[FN23] *U.S. v. Cody*, 114 F.3d 772, 776–77 (8th Cir. 1997) (the pretrial statement need not be “diametrically opposed” to the trial testimony); *U.S. v. Matlock*, 109 F.3d 1313, 1319 (8th Cir. 1997) (“inconsistency is not limited to diametrically opposed answers”); *U.S. v. Strother*, 49 F.3d 869, 874 (2d Cir. 1995) (“statements need not be diametrically opposed to be inconsistent”); *U.S. v. Gravely*, 840 F.2d 1156, 1163 (4th Cir. 1988) * * *.

[FN24] *State v. Kingsbury*, 58 Me. 238, 1870 WL 2976 (1870); *Town of Concord v. Concord Bank*, 16 N.H. 26, 1844 WL 2198 (1844); White, *The Art of Impeachment and Rehabilitation*, * * *

[FN25] *Com. v. Jackson*, 281 S.W.2d 891 (Ky. 1955). See the comment by Davis, J. in *Judson v. Fielding*, 227 A.D. 430, 237 N.Y.S. 348, 352 (3d Dep’t 1929), “In considering the evidence so sharply in dispute, the jury was entitled to know the contrary views the witness had expressed when the incident was fresh in his mind,

uninfluenced by sympathy or other cause. Very often by calm reflection a witness may correct inaccurate observations or erroneous impressions hastily formed. But the jury should have all the facts in making an appraisal of the value and weight to be given the testimony.”

Here, Dr. Urse’s affidavit (51a) states (§4) he was paged, detoured to pick up his intubation kit, went to the ER, and from there (§5) referenced his notes in the medical record (47a) (appellant’s brief, p. 7). There is no mention of consultation with Dr. Kowalski, or even of encountering Dr. Kowalski, salient details which could hardly be omitted from documents as formal as an affidavit or a medical progress note, still less from both. What Prof. McCormick says—(his FN 18 above), citing *O’Neill v Minneapolis St Ry Co*, 213 Minn 514, 521; 7 NW2d 665, 669 (1942), “If there is any variance between them, the statement should be received and its effect upon the credibility of the witness should be left to the jury.”; (FN 20 above), citing *Esderts v Chicago, RI. & P R Co*, 76 Ill App 2d 210, 228; 222 NE2d 117, 127 (1st Dist, 1966), “If a witness fails to mention facts under circumstances which make it reasonably probable he would mention them if true, the omission may be shown as an indirect inconsistency.”; and (FN 23 above) citing *US v Gravelly*, 840 F2d 1156, 1163 (CA 4, 1988): “It is enough if the ‘proffered testimony, taken as a whole, either by what it says or by what it omits to say’ affords some indication that the fact was different from the testimony of the witness whom it sought to contradict” —properly applies. Of course, since the trial court rejected the defense attempt (607a) to preclude use of the Urse affidavit for impeachment on grounds it was not inconsistent (623a-624a), it is Dr. Kowalski who in this Court must show an abuse of discretion in that regard, and although he attempts to do so (appellant’s brief, pp. 19-22), that is not an issue on which he sought, or was granted, leave to appeal¹⁸ (appellant’s application for leave to appeal, pp. i-ii, vi—57b-59b. Therefore, since the trial court’s (discretionary) determination that the

¹⁸ Nor was it an issue in Dr. Kowalski’s cross-appeal in the Court of Appeals, which he did not pursue here, where the issues were denial of a directed verdict and reopening of the proofs.

affidavit was sufficiently inconsistent to be used for impeachment is not properly before this Court, the real question is whether the trial court erred in refusing to admit the affidavit itself as an exhibit (as well as surrounding documentation), NOT whether the affidavit was or was not inconsistent.

2. The Urse affidavit was not hearsay (Kowalski's brief, pp. 26-29)

Mostly ignoring MRE 801(d)(1)(A) entirely—except to misanalyse its application in terms of whether it was adopted by Dr. Kowalski (which has to do with MRE 801(d)(2)(B)—Dr. Kowalski's brief addresses the complete red herring issue of whether it might be hearsay under some other subrule. Moreover, he misleadingly cites MRE 801(d)(1) as limiting “the substantive admission of prior inconsistent statements to statements by a party to the lawsuit” (Kowalski brief, p. 26) That is so utterly ridiculous—MRE 801(d)(1) is captioned “*Prior Statement of Witness*”¹⁹; MRE 801(d)(2) applies to admissions by party-opponents. The subject of “prior proceeding” has been previously addressed (above, pp. 27-28), as has the matter of harmless error (above, pp. 39-40) (on which Dr. Kowalski can cite only an unpublished criminal case).

3. Dr. Kowalski's Issue II erroneously conflates admission with admissibility

Plaintiff has previously distinguished admissibility, a legal question reviewed de novo, from admission of evidence, which generally involves discretion (above, pp. 19-26). Dr. Kowalski, however, conflates the two, again failing completely to recognize that evidentiary issues can ever involve a legal question (appellant's brief, pp. 29-30). Dr. Kowalski also, again, accuses the Court of Appeals of applying the wrong review standard (see above, p. 19, footnote 10).

¹⁹ Unlike MCR 1.106, the MRE's do NOT contain a provision negating the notion that the captions are part of the rules. Only the accompanying notes are disavowed by MRE 1102. In any event, nothing in the language of MRE 801(d)(1) suggests it does not apply to all witnesses.

4. Dr. Kowalski's analysis (his brief, pp. 31-37) of MRE 104(b), 602 and 401 is incorrect

Perhaps the most telling indication that Dr. Kowalski's arguments as to the meaning and application of MRE 104(b), 602 and 401 is that he always chooses to characterize what the Court of Appeals said, without ever allowing the Court of Appeals to speak for itself. Here is what the Court of Appeals actually said (in part, 31a-32a) (bold faced emphasis added):

With respect to the email, the question presented is a simple one of logical relevance. Logical relevance is the foundation for admissibility. *People v VanderVliet*, 444 Mich 52, 60-61; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Logical relevance is defined by MRE 401 and MRE 402.

As defined by MRE 401, "relevant evidence" is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 402 provides: "**All relevant evidence is admissible**, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.

The Court of Appeals, contrary to defendant's false characterization, properly linked logical relevance directly to admissibility by quoting MRE 402. Given that defendant concedes logical relevance, admissibility follows *ipso jure* under MRE 402, unless some exception applies. Only after addressing relevance and concomitant admissibility (32a)—and finding relevance based on *People v Layher*, 464 Mich 756, 761-764; 631 NW2d 281 (2001), citing *United States v Abel*, 469 US 45; 105 S Ct 465; 83 L Ed 2d 450 (1984) and *Wilson v Stilwill*, 411 Mich 587, 599; 309 NW2d 898 (1981), quoting 3A Wigmore, Evidence (Chadbourn Rev), § 944, p.778²⁰—did the Court of Appeals turn attention to MRE 104(b), not to support admission of the impeaching evidence, but to see if defendant identified a viable objection to admission (32a-33a):

Thus any evidence that Dr. Urse knew the contents of the email, or was himself misled by his insurer, is clearly relevant, and admissible, to impeach his trial testimony. On this score, we have here a classic case of "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact..." MRE 104(b). In such case, the court shall

²⁰ Notably, defendant does not argue that the Court of Appeals' relevance analysis was incorrect.

admit [the evidence] upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.” *Id.* Here, the relevancy of the email exchanged between Ms. Croze and plaintiff’s counsel are relevant for the reasons set forth above, but only if Dr. Urse was aware of the emails, or if not, was he kept in the dark by his insurer.

It appears from the record that the trial court found “no evidence” that Dr. Urse knew of the email. But the court apparently erroneously decided the question under subpart (a) of MRE 104, and not according to subpart (b). The standard for screening evidence under subpart (b) is quite low.

MRE 104(b) is identical to its federal counterpart. In *VanderVliet*, 444 Mich at 68, our Supreme Court, in deciding the applicable standard for Rule 104(b), specifically adopted the United States Supreme Court’s holding in *Huddleston v United States*, 485 US 681; 108 S Ct 1496; 99 L Ed 2d 771 (1988). In *Huddleston*, * * * The Supreme Court held:

[Q]uestions of relevance conditioned on a fact are dealt with under Federal Rule of Evidence 104(b).... In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact—here, that the televisions were stolen—by a preponderance of the evidence.

* * *

We emphasize that in assessing the sufficiency of the evidence under Rule 104(b), the trial court must consider all evidence presented to the jury. ‘[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts.’ *Bourjaily v United States*, 483 US 171, 179–180 [107 S Ct 2775; 97 L Ed 2d 144] (1987).” [*VanderVliet*, 444 Mich at 68–69 n.20, quoting *Huddleston*, 485 US at 689–691.]

* * *

Here, the sum of the evidentiary presentation could lead a rational jury to find that Dr. Urse, either wittingly or unwittingly, participated in an effort to “sandbag” the plaintiff. It is impossible to ignore the timing and the substance of the email between plaintiff’s counsel and Croze.

The burden of identifying an exception to admissibility under MRE 402 falls on Dr.

Kowalski as the party objecting to admissibility:

Because all evidence is admissible unless excluded by some specific rule (MRE 402), the burden is properly on the party objecting to proffered evidence to make clear why it should be excluded. Thus, the ground of an objection to evidence, if not readily apparent, “should be stated with perspicuity and particularity, in order that it may be understood by

the court". *Case v Klute*, 283 Mich 581, 585; 278 NW 721 (1938).

Tibitoski v Macomb Disposal Service, Inc, 136 Mich App 259, 263-264; 356 NW2d 15 (1984).

Dr. Kowalski objected (incorrectly) to the e-mail only on grounds of hearsay and privilege—and defendant is now limited to only the stated grounds of objection.²¹ MRE 103(a)(1); *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). The correspondence was not hearsay because it was not offered for the truth of anything appearing therein, but to establish Dr. Urse's motivation for preparing an affidavit and the substantive parameters necessary for the affidavit to serve his purposes. MRE 801(c). Neither was it subject to attorney-client privilege, for reasons earlier adduced. *Yates v Keane*, *supra*; *Koster v June's Trucking*, *supra*. As for work product privilege, Ms. Croze is not a member of the State Bar of Michigan; her correspondence, particularly when addressed to Mr. Weiner, counsel for plaintiff, is therefore not work product of an attorney. Even if, as Dr. Urse claimed *ipse dixit* and without detail, he spoke with a "legal representative" before creating his affidavit, nothing created by an attorney forms any part of the impeaching material, and therefore work product privilege also has no application. As this Court held in *JA Utley Co v Borchard*, 372 Mich 367, 372-373; 126 NW2d 696 (1964):

No privilege arises when an attorney, engaged by an insurer to prepare for litigation, simply 'directs' or 'supervises' the taking of statements and the doing of other preparatory work by employees of the insurer. Such employees are selected, hired and paid by the insurer, not by the attorney, and they owe primary allegiance to their employers. They are agents of the insurer rather than the attorney; their status for instant purposes being the same as that of Grand Trunk's Agent when the latter took the statement discovered in *La Croix*. * * *

* * *

To enjoy the privilege in the context of this case the document must be the attorney's own work product; not the product of work done by agents and employees owing primary allegiance to their employers rather than to the attorney.

²¹ This renders irrelevant defendant's brand new arguments that the correspondence is not admissible under MRE 403 (Kowalski's brief, pp. 37-38), or MRE 801(c) despite not being offered for the truth of anything within the correspondence (*id.*, pp. 38-41), or other new grounds never previously raised (*id.*, pp. 41-42, citing MRE 801(d)(2)(C) and (D) and 901).

Of course, since the affidavit was created for the precise purpose of persuading Mr. Weiner, an opposing attorney, not to sue Dr. Urse for malpractice, and no attorney for either the insurer or Dr. Urse was party to the correspondence, it is difficult to see how any privilege might conceivably arise, *Yates v Keane*, *supra*, still less a *work product* privilege.

5. Dr. Kowalski's claim of harmless error is hopelessly incorrect

Dr. Kowalski grounds his assertion of harmless error (Kowalski's brief, pp. 42-43) on the fact the jury found him not negligent. *But that finding was itself the product of denial of access to the key evidence showing that Dr. Kowalski delayed intubation to a fatal degree*, and was himself so busy with other patients that he left Mrs. Johnson without a physician in attendance qualified to intubate her. Such speciously circular reasoning was correctly rejected by the Court of Appeals (34a), citing *Powell v St John Hosp*, 241 Mich App 64, 72-75; 614 NW2d 666 (2000), a case nowhere referenced in Dr. Kowalski's brief. If in 50 pages of bumf he cannot find anything to criticize about the holding or application of *Powell*, he has waived the issue²².

6. Dr. Kowalski's "public policy" argument (brief, pp. 43-49) is entirely fatuous

The contention admission of the Weiner-Croze correspondence would "chill" the notice of intent process under MCL 600.2912b is risible. Defendant cannot (and makes no attempt to) point to any statutory language which restricts the admissibility of presuit communications in any way, shape or form. Granting the Legislature was free to do so, *McDougall v Schanz*, 461

²² *Powell* seems truly on point (substitute "Kowalski" for "Tiernan" and defendant for plaintiff):

By the trial court's refusal to allow defendant to present evidence concerning the true reason for Tiernan's termination, Tiernan was permitted "to make himself out impartial and disinterested," *id.*, a righteous doctor whose only concerns were for justice and patient care. * * * Because the outcome may well have been affected by defendant's inability to present evidence concerning a different motivation for Tiernan's testimony, the jury verdict must be reversed and defendant given a new trial. [*Id.* at 74-75]

Mich 15, 30-31; 597 NW2d 148 (1999), it did nothing of the kind. Defendant is attempting to inveigle this Court into reading into the statute something the Legislature did not put there (in addition to presenting an issue on which leave was NOT granted). This Court has repeatedly abjured against judicial rewriting of legislation. An excellent exemplar of this principle is found in *Halloran v Bhan*, 470 Mich 572, 577; 683 NW2d 129 (2004), quoting *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002) (boldfaced emphasis added):

“A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999).”

In *Roberts* itself, 466 Mich at 58, this Court began its opinion with an *angst*-ridden expression of *Weltschmerz* at once again having to undertake the task of correcting lower courts that opted to find words in a statute that the Legislature omitted and reminding bench and bar not to do so:

This case again calls into question the authority of courts to create terms and conditions at variance with those unambiguously and mandatorily stated in a statute. We reaffirm that the duty of the courts of this state is to apply the actual terms of an unambiguous statute.

Defendant’s effort to have this Court read into the statute what is plainly not there must be rejected at the threshold²³.

Moreover, defendant’s theory about the workings of the notice of intent statute are without *legitimate* foundation²⁴. A potential malpractice defendant who, during the mandatory

²³ Defendant cites Fla Stat Ann §766.205(4), which contains quite specific language restricting presuit investigation materials for evidentiary use “for any purpose”. MCL 600.2912b contains no similar language, making reliance on Florida case law unspeakably nonsensical.

²⁴ Defendant purports to find the statutory purpose in a Senate Analysis dated August 11, 1993 and a House Analysis dated March 22, 1993. This is the type of “legislative history” which this Court has more than once denigrated as bumf, possibly the work of lobbyists, and not necessarily reflecting the actual position of a single Michigan legislator. *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 587; 624 NW2d 180 (2001) (stating that “in Michigan, a legislative analysis is a feeble indicator of legislative intent [*footnote 24 continues on next page*]”).

waiting period, succeeds in persuading the putative plaintiff not to sue, can hardly justify making representations, still less under oath, with complete impunity. MRE 408 provides (boldfaced emphasis added):

* * * Evidence of conduct or statements made in compromise negotiations is likewise not admissible. * * * **This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.**

By its terms, the rule excludes “statements made in compromise negotiations” only when offered to prove (or disprove) liability or damages, not to insulate possible perjury or falsification of medical records from exposure to the light of day. “[T]he rule does not require the exclusion of evidence when offered for another purpose * * *.” *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993). Here, the correspondence between Mr Weiner and Ms. Croze does not even discuss, let alone prove or disprove, liability or damages as to Dr. Kowalski (since it concerned only Dr. Urse), and it is offered in evidence to put Dr. Urse’s affidavit in context, and to expose his possible false testimony at trial. As noted in *Pantely v Garris, Garris & Garris, PC*, 180 Mich App 768, 777; 447 NW2d 864 (1989):

[footnote 24 continued from previous page]and is therefore a generally unpersuasive tool of statutory construction”); *In re Certified Question from the US Court of Appeals for the Sixth Circuit (Henes v Continental Biomass)*, 468 Mich 109, 115 n. 5; 659 NW2d 597 (2003) (discussing why a legislative analysis, as opposed to other forms of legislative history, is a poor aid in statutory interpretation and “should be accorded very little significance by courts when construing a statute”).

In *Bush v Shabahang*, 484 Mich 156, 174 n. 29; 772 NW2d 272 (2009), cited by defendant, this “history” was mentioned only *after* the Court first noted that a penalty provision, which appeared in the original legislation as introduced in the Senate, was omitted by the time of final passage: “We can draw no conclusion from the omission of the dismissal penalty in §2912b other than it was not the intent of the Legislature to incorporate a mandatory dismissal penalty into § 2912b.” The Court then turned to the “history” only to support the conclusion that such an intent could not be read into the statute. Here, defendant proposes to use “history” to find in the statute a subject not even mentioned in either the actual legislation or the legislative analyses prepared by staff (possibly with lobbyist input).

[P]erjury is not complex; and telling the truth poses no dilemma. Even against the backdrop of a moral relativism that passes for intellectual sophistication in contemporary America, perjury is wrong. More pointedly, it is a crime. MCL 750.422; MSA 28.664. A law degree does not add to one's awareness that perjury is immoral and illegal, any more than an accounting degree adds to one's awareness that tax fraud is immoral and illegal.

This Court should be loth to find in MCL 600.2912b a statutory license to commit perjury. Indeed, even if, by some mystically Eleusinian process of divination the Court were to discern in MCL 600.2912b some intent to insulate communications during the waiting period from later exposure in evidence, still, the perjury statute is specific and direct, and necessarily trumps a more general statute. *Jones v Enertel, Inc*, 467 Mich 266, 270-271; 650 NW2d 334 (2002).

As for MRE 411, the Court of Appeals, in a passage again totally ignored by Dr. Kowalski, said everything necessary regarding application of that rule (35a footnote 2).

7. The trial court also erred in barring Ms. Croze as a rebuttal witness

Defendant again attempts to advance new grounds for precluding calling Ms. Croze in rebuttal. Her testimony would have exposed Dr. Urse's understanding of the purpose of his affidavit, thereby revealing the falseness of his and Dr. Kowalski's trial version of critical events. That is proper rebuttal. *Lexchin v Mathews, supra*.

RELIEF REQUESTED

Leave to appeal should be denied as improvidently granted. Alternatively, the Court of Appeals' direction for a new trial, at which the disputed evidence shall be admitted, should be affirmed. Dr. Urse's affidavit, the engendering e-mail between Mr. Weiner and Ms. Croze, and her testimony and relevant parts of her file, must all be admitted into evidence to allow the trier of fact full and fair basis for evaluating the weight and credibility of the conflicting evidence.

Respectfully submitted,

